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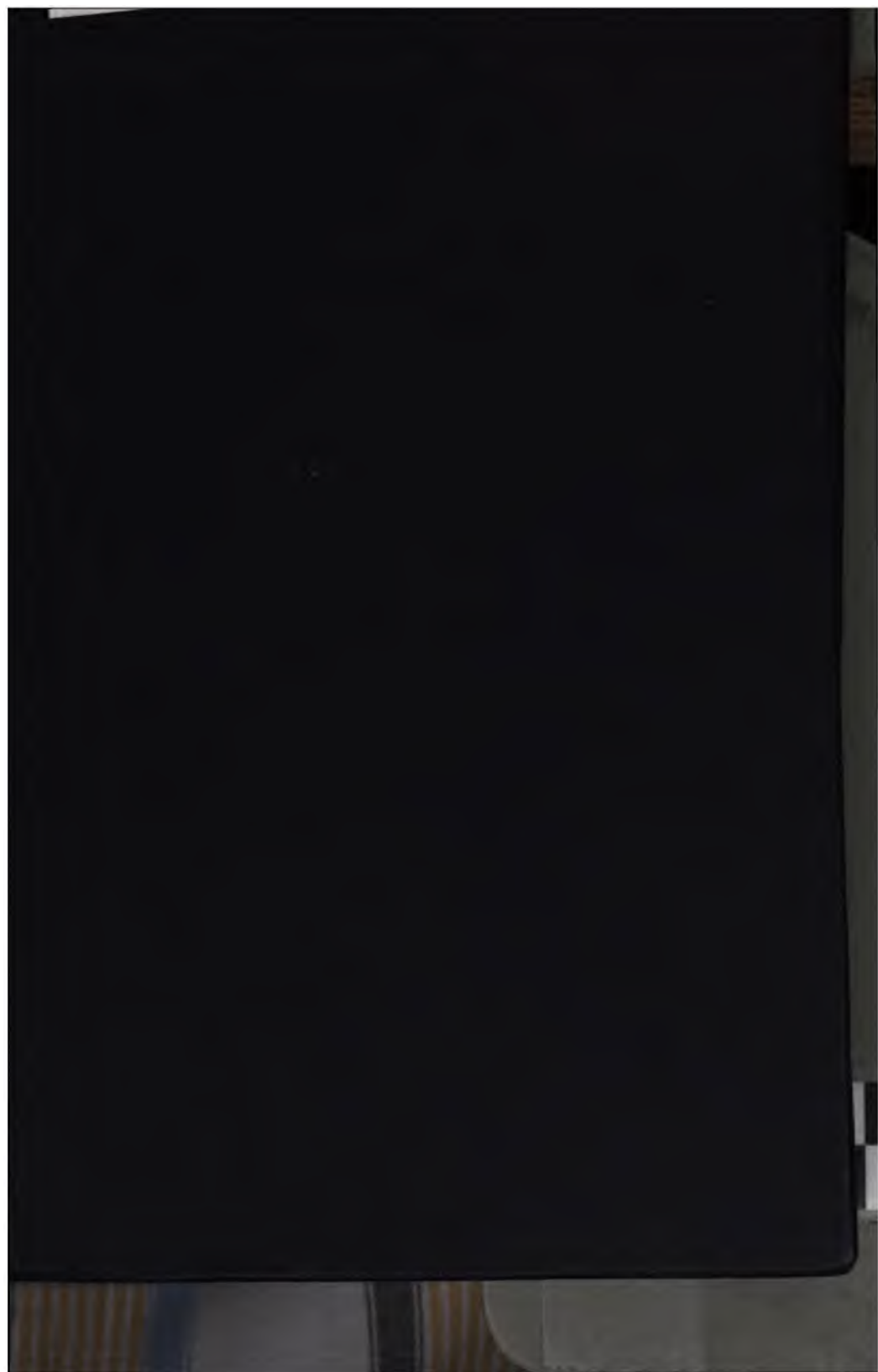
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# **THE PEOPLE'S LAW**



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THE PEOPLE'S LAW  
OR  
POPULAR PARTICIPATION IN  
LAW-MAKING

FROM ANCIENT FOLK-MOOT TO MODERN  
REFERENDUM

A STUDY IN THE EVOLUTION OF DEMOCRACY  
AND DIRECT LEGISLATION

BY

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BY

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*Lex est quod populus jubet atque constituit.* — GAIUS (ca. 150).

*Leges nulla alia causa nos tenent quam iudicio populi receptae sunt.*

— ULPIAN (ca. 215).

*Tum demum humanae legis habent vim suam, cum fuerint non modo institutae approbatione communitatis.* — GRATIAN (ca. 1150).

“Every law which the people in person have not ratified is invalid; it is not a law.” — ROUSSEAU (1762).

“The basis of our political systems is the right of the people to make and to alter their constitutions of government.”

— WASHINGTON (Farewell Address, 1796).

“The American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships and took possession of the state . . . ; it became the law of laws.” — DE TOCQUEVILLE (1835).

To

GEORGE ELLIOTT HOWARD

FROM WHOSE LUMINOUS INSTRUCTION

THE AUTHOR FIRST CAUGHT THE HISTORICAL

CONCEPTION OF LAW

THIS WORK

IS APPRECIATIVELY DEDICATED

## ERRATA

Page 2, footnote, line one from bottom. For "Property," read "Propriety."

Page 28, footnote No. 1. For "Publication Instruction," read "Public Instruction."

Page 32, line 17. For "*Ordinannces*," read "*Ordinnances*."

Page 89, line 24. For "Wetherford," read "Wetherfield."

Page 141, footnotes. For "Ramsey," read "Ramsay" throughout.

Page 162, footnote No. 4. For "1821," read "1801."

Page 202, footnotes. The quotation from Oberholtzer should be in the third footnote.

Page 208, footnote No. 5. For "1673," read "673."

Page 259, footnote No. 6. Read "Illinois Laws, 1847, sec. 6, p. 35."

Page 314, footnote. Insert "XIII" after the words "Harvard Law Review."

Page 365, footnote No. 8. For "R. I. Platt," read "R. T. Platt."





## PREFACE

SOME years ago, in preparing for the "American and English Encyclopedia of Law" the article on "Constitutional Law," the author was led to investigate the interesting question of the validity of the then recently proclaimed southern constitutions which had not been ratified by the people. It soon became apparent that the dearth of direct judicial authority on the question precluded, as yet, a final answer from that source, and that it would be necessary to approach the problem from the historical standpoint and to study actual rather than judicial precedents. In other words, and in the absence of positive enactment or decision, the investigation became a search for the origin of the practice of popular ratification, an inquiry concerning the extent to which it had become general, and an effort to determine from that source how far, if at all, that practice had ripened into law. For, as Sir James Mackintosh well said, "constitutions grow; they are not made;" and, he might have added, the doctrines of constitutional law are more often the products of civic evolution than the formulas of a definite individual or body or of a given occasion. If we would learn whether a principle has really become a part of our constitutional law, we must know something of its history and of how deeply it is rooted in our constitutional experience. In studying the subject upon these lines it was found necessary to follow the development, not only of constitutions, but of law-making in general. Moreover, as the work advanced other questions presented themselves for discussion, such as the effect of the practice of popular ratification, its desirability from the standpoint of political science, and the results toward which it appeared to be tending. Indeed, the material, at first apparently meagre, became in time so voluminous that the mere process of selection was not the least of the difficulties encountered. The results of the search thus inaugurated — the materials thus collated, analyzed, and discussed — constitute the book.

The second and largest part is not a history of constitutions; only an attempt to trace the origin, and thereby determine the

necessity, of one, though probably the most important, step in constitution-making. Nor is it intended as a history of constitutional conventions. The author has not attempted to duplicate the work so thoroughly done by Judge Jameson a generation ago. Some conventions indeed, which, like the first of Massachusetts, were landmarks in the development of popular ratification, have been treated at length. And, generally, the plan has been followed, even at the risk of incurring criticism for too much quotation, of allowing the sources and authorities to speak for themselves. Accordingly, wherever practicable, the original material has been placed at the disposal of the reader in order that he may judge for himself as to the soundness of the conclusions drawn.

Certain collateral phases of the subject are left for treatment in works devoted thereto. The fruitful experience of Switzerland is touched upon here only in connection with the origin and development of popular participation. The direct primary and the employment of the referendum by private agencies like labor unions, while affording interesting side lights, are not instances of law-making, nor do they, like the guild ordinances and church covenants, constitute the germs—but are rather the accompaniments—of the movement.

The work was practically completed in 1904, but for several reasons, chief among which was the author's departure for the Philippines, it became necessary to defer publication, and advantage has been taken of the delay to add some new matter. The author desires here to render tardy acknowledgment for valuable suggestions to Professor Willis M. West, of the University of Minnesota, and to Professors H. W. Caldwell and F. M. Fling, of the University of Nebraska; for aid in procuring important materials, to Hon. Amasa M. Eaton, of Providence, Rhode Island, Librarian Isaac S. Bradley, of the Library of the Wisconsin State Historical Society, and Mr. George H. Shibley, of Washington, D.C.; for general assistance of a substantial character, to Miss Katherine Foos, of the Omaha Public Schools, and Miss Margaret O'Brien, of the Omaha Public Library, and last, but not least, to one at home, his wife, who did most of the tedious though important work of verification.

AUDIENCIA, MANILA,  
April 30, 1909.

## INTRODUCTION

It is significant that nearly the whole body of the scientific literature of American history has been produced during the forty years since the close of the Civil War. Before that time a few writers like Bancroft, Hildreth, and Parkman had found at home themes worthy of their pens; while many others — essayists, novelists, and historians alike — were still harking back to the twice-told tales of the Old World. With the end of the final struggle for the consolidation of the federal Union a marvellous change took place: suddenly a vast unexplored field of American life was disclosed. American history, in its every aspect, became exceedingly attractive to American students; and there arose a keen and healthy rivalry in its exploitation.

The result is inspiring and full of promise. We have no just reason to be ashamed of the historical output of the past four decades. A goodly number of general works of first-rate quality — narrative, biographical, and institutional — have appeared; while every month extends the formidable list of special monographs. Indeed it is becoming more and more clear that without such a precedent monographic literature a full and true national history cannot be produced. Such a history must proceed, directly or indirectly, from the coöperation of a host of scholars. It must rest on the basis of a microscopic examination of every part of the source materials. Thus, incidentally, we perceive the important function of the academic dissertation; for a very large share of our historiography consists of collegiate and university theses — the worthy product of the quarter of a century of graduate study in the United States.

Much of this literature deals with the history of institutions. For this fact there are two adequate causes. On the one hand, institutions afford the best opportunity for scientific historical training. Institutions are essentially biological in character, since they are the resultant or residuum of human experience. In a very real sense they are the outward or concrete expression of human habits.

If not true organisms, they are at any rate organizations, each discharging its proper social function; and hence they readily lend themselves to exact analysis and fruitful comparison. The evolutionary element — the element which gives such a zest to historical and sociological research — is the vital principle of all institutional history. On the other hand, American institutions in particular — whether social or political, religious or secular, local or national — relatively afford an almost inexhaustible field for research. The materials for their study are abundant and easily accessible; while they are singularly interesting because they are instinct with the vital forces of one of the most progressive societies on the globe.

The history of American institutions reveals a remarkable dualism which at once quickens the interest and refines the discipline afforded by its study. Everywhere and in all stages of progress the discerning student recognizes the contrast of continuity and innovation. This dualism is especially pronounced during the era of institutional beginnings. While the colonists brought with them a rich heritage of laws, customs, and constitutional principles, they did not hesitate to introduce new laws, customs, and principles of singular originality and unique social value, nor to give new meaning to old forms, methods and organizations.

In the New England colonies the innovation was even more striking than the continuity. It would indeed be strange if the planting of new states in the wilderness had not brought to thoughtful men a rare opportunity for freeing themselves from the trammels of antiquated usages, methods and traditions, which the inertia of vested interests might yet for ages sustain in the native land. Accordingly, even in the days of the so-called theocracy in Massachusetts, the American doctrine of complete separation of church and state had arisen and was already bearing fruit. Partly through zeal in proscribing the ceremonies and usages of the Roman and Anglican churches, the Puritan often showed a strong reaction in favor of the temporal power in matters hitherto regarded as exclusively pertaining to the spiritual jurisdiction. The forces of local self-government were quickened. Thus for a time the town-meeting and the religious congregation were virtually one and the same; but authority was exercised in the name of the lay township and not in that of the ecclesiastical parish. So likewise the probate of wills, the administration of estates, the exercise of chancery jurisdiction, and the con-

trol of primary and secondary education were taken out of the hands of the church and vested mainly in the local civic community. In the secularization of education Massachusetts anticipated the mother country by more than two centuries and a half. There was an example of even bolder change: civil marriage and civil divorce were sanctioned throughout New England. For more than sixty years after the first settlement the priest was entirely superseded by the magistrate in the solemnization of wedlock; although before the middle of the eighteenth century the American system of optional lay or ecclesiastical celebration — imitated in England since 1836 — was already firmly established.

The dualism referred to — the union of the old and the new, the blending of conservatism and radicalism — is exhibited in a significant way in the history of the federal constitution. Unquestionably the American people have made three great contributions to the political organism and to political science: the constitutional convention, the written constitution, and constitutional law. Yet each of these institutions has an earlier history more or less distinct.

No doubt the constitutional convention has faint prototypes in the English revolutionary and "convention" parliaments of 1399, 1660, and 1689. This fact is important; yet it should not for a moment be suffered to obscure the far more significant fact that as a distinct political organ, with a special function to perform — an organ to be compared to a court, an executive, or a legislature — the constitutional convention was born and developed in America. As a representative body, created according to definite principles to discharge a single special function, that of enacting organic as opposed to mere statute law, it first made its appearance, fully differentiated, in the Massachusetts convention of 1780 (the type of subsequent state constitutional conventions) and in the national convention of 1787. Since then it has gained its own law and its own literature, and it has taken its proper place in the *Staatsrecht* of the world.

Similarly in English history there are forerunners and even examples of the written constitution. The Constitutions of Clarendon, Magna Charta, the Bill of Rights, the Act of Settlement, are all solemn written declarations of fundamental rights and constitutional guaranties which were intended to have a sanction higher than that of ordinary statutes; while — fourteen years after the "Funda-

## INTRODUCTION

Laws" of Connecticut and the "Fundamental Agreement" of the Colony of Massachusetts were drafted (1639) — Cromwell in his "Instrument of Government" (1653) provided a written constitution for the government of the three kingdoms which it united in one.

Nevertheless, the written constitution as an actuality, as a fixed and permanent form of organic law, is essentially the product of American political evolution. It is easy to show that its elements are nearly all drawn from earlier colonial or English experience; yet in the combination of those elements there is an element of rare significance. Taken as a whole, the federal constitution is a highly original product of social legislation.

The case is much the same with the third contribution above mentioned — constitutional law. Constitutional law, as systematic regulation of an instrument of government, is an American product. Long before Lord Brougham in the *Wensleydale Peerage* had declared that "things may be legal and yet unconstitutional," James Otis in arguing against the writs of assistance affirmed that "an act against the constitution is void" and that the executive courts must pass such acts into disuse. The principle, destined to become so vital in our national life, is

view which British statesmen under George III might well have heeded.

Assuredly this ancient common law function of the English courts is an interesting and highly important fact which too often has been overlooked. Still, there is a more significant fact which should not be ignored: the first body of constitutional law arose in America as the necessary complement of the written instrument of government. Before constitutional principles are embodied in an organic statute it is difficult or impossible to develop a system of judicial interpretation. Indeed, under the written instrument, the task has been enormous. The success with which it has been accomplished is largely due to the fact that the solid basis was laid by one mind. During thirty-five years, 1801-1835, John Marshall illuminated the constitution and drew out the powers of the Supreme Court. In this period not less than thirty-six opinions on constitutional questions were submitted by him; and these display the unity and power of a systematic treatise on public law.

The constitutional function of the Supreme Court of the United States in theory may be a logical development of the principles of the English common law; but it is precisely the opportunity for that development, afforded by the written instrument, which constitutes the originality of the American plan.

The conclusions just presented are abundantly illustrated in Dr. Lobingier's important contribution to American institutional history. His monograph rests upon a wealth of source materials never before thoroughly explored. He has enabled the student securely to follow the evolution of the written constitution in the colonial and revolutionary periods and in the individual states during the century and a quarter of our national existence. This evolution yields many a lesson of vital import to those who are seriously interested in the welfare of American society. In particular, the long story of the constitutional referendum, from the days of Calvin and Cartwright to the latest experience of our Southern and Western states, very clearly reveals the same dualism of continuity and innovation which marks other branches of our institutional development. The author has enriched our historical literature with an illuminative treatise which will prove of great service to every student of political science and jurisprudence.

GEORGE ELLIOTT HOWARD.





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# THE PEOPLE'S LAW

## A

### GENESIS

#### CHAPTER I

##### PRIMITIVE POPULAR ASSEMBLIES

ONE of the conspicuous features of the public life of early Aryan peoples was the popular assembly. Even if we accept the conclusions of recent German scholarship<sup>1</sup> that the earliest folkmoot was an assembly of warriors and that in time of peace it became a mere gathering of individuals who were not even bound by its action, the

<sup>1</sup> "Die germanische 'civitas' entbehrte zu Caesars Zeiten — für gewöhnlich oder im Frieden — noch jeder 'vollziehenden Gewalt,' noch aller Organe, durch welche die Gesamtheit, resp. irgend eine Gesamtheit, als solche einen Willen zu bethätigen oder ein Recht geltend zu machen im Stande gewesen wäre.

"Auch die 'Concilien' waren nichts weiter als Volksversammlungen in welchen nur jeder Einzelne als solcher seinen Willen zum Ausdruck zu bringen oder Verbindlichkeiten einzugehen vermochte, aber noch keine Beschlüsse gefasst werden konnten, die für alle, d. h. auch für solche, welche denselben nicht zugestimmt hatten, oder für die Abwesenden, bindend gewesen wären. . . . Zu Caesars Zeiten bestand — im Frieden oder für gewöhnlich — noch überhaupt kein Gemeinwesen, keinerlei Gesamtheit im Sinne des Rechts. Das ist der volle Sinn der Worte: 'in pace nullus est communis magistratus.' Und wenn Caesar nichtsdestoweniger von einer germanischen 'civitas' spricht, so hat er dabei eben nur den Kriegszustand im Auge.

"Für gewöhnlich oder in Friedenszeiten gab es zu Caesars Zeiten bei den germanen nur Stämme, Geschlechter, Familien, Individuen, aber noch keine 'Gemeinde,' so wenig wie einen 'Staat'; denn eine Gemeinde ohne Willensorgan ist ein Unding, in der That nichts anderes als das Lichtenberg'sche 'Messer ohne Klinge an welchen der Stiel fehlt.'" — Hildebrand "Recht und Sitte" (Jena, 1896), 69, 71.

Cf. Lamprecht, "Deutsche Geschichte" (Berlin, 1891), I, 145 *et seq.*, who concedes to the early Teutonic assembly certain judicial functions which, however, he says were soon lost.

fact remains that we have in this martial assembly the framework of a popular legislature.<sup>1</sup> If its activities at first were confined to matters of war, it must not be forgotten that war was then the normal state, and that as periods of peace were lengthened and national solidarity promoted, the transition would be easy to a body which should consider other than military questions.<sup>2</sup> It is not, however, within the scope of this work to treat exhaustively of the functions of this archaic institution, though it seems necessary to glance at it *en passant* for such light as it may throw upon the general theme. It will suffice here to note that our first glimpse of each of the great

<sup>1</sup> The term "legislative" as applied to the functions of the early folkmoot has been criticised. But it may well be asked if even the assembly of warriors did not really exercise the power of a modern legislature when it determined the question of peace or war?

"In the infancy of society," says Sir Henry Maine, "many conceptions are found blended together which are now distinct, and many associations which are now inseparable from particular processes or institutions are not found coupled with them. There is abundant proof that legislative and judicial power are not distinguished in primitive thought."—"Early History of Institutions," 26.

So Freeman observes:—

"The primary Assembly, of whatever kind, is in its own nature sovereign. It is the gathering together of the whole nation, or of the whole ruling part of the nation. The whole power of the nation is therefore vested in it. It is only gradually and by slow steps that there arises that distinction between legislative, executive, and judicial powers on which such stress is laid in the refined political theories of modern times."—"Comparative Politics," 241.

<sup>2</sup> The conception of the primitive assembly as a law-making body, even if not strictly historical, has nevertheless done much to revive and preserve the notion of the people as the source of legislative power. Calvin in his "Institution" (*post*, 29) refers to the Greek and Roman assemblies as precedents for his democratic theory of church government, and William Penn, in a work put forth in 1673, entitled "England's Present Interest Considered," discourses as follows:—

"By Fundamental Laws, I do not only understand such as immediately spring from Synteresis (that eternal principle of Truth and Sapience, more or less disseminated through mankind,) which are as the corner stones of human structure . . . but those rights and privileges which I call *English*, and which are the proper Birth-right of Englishmen, and may be reduced to these three.

"I. An Ownership, and Undisturbed Possession: That what they have, is Rightly theirs, and no Body's else.

"II. A Voting of every Law that is made, whereby that Ownership or Propriety may be maintained.

"III. An influence upon, and a Real Share in, that Judicatory Power that must apply every such Law: which is the Ancient, Necessary and Laudable Use of Juries: If not found among the Britons, to be sure practised by the Saxons, and continued through the Normans to this very Day.

\* \* \* \* \*

"II. A Voting of every Law that is made, whereby that Ownership or Property may be maintained.

Mediterranean nations reveals the presence of some body like this primitive assembly.

Thus in the Homeric poems we find existing side by side with the βασιλεὺς and the council of γέροντες the assembly of warriors or common men, to which was communicated the more important con-

"This second fundamental of our English government, was no incroachment upon the kings of more modern ages, but extant long before the Great Charter made in the reign of Hen. III even as early as the *Britons* themselves; and that it continued to the time of Hen. 3. is evident from several instances.

"Cæsar, in his Commentaries, tells us, 'That it was the custom of the British cities to elect their General or Commander in chief, in case of War.' Dion assures us, in the life of Severus the Emperor, 'That in Britain the People held a share in Power and Government'; which is the modestest construction his words will bear. And Tacitus, in the Life of Agrippa, says, 'They had a Common Council; and that one great reason of their overthrow by the Romans, was, their not consulting with, and relying upon, their Common Council.' Again, both Bede and Mat. Westminster tell us 'That the *Britons* summoned a Synod, chose their Moderator, and expelled the Pelagian Creed.' All which supposes popular assemblies, with power to order national affairs.

"And indeed, the learned author of the 'British Councils' gives some hints to this purpose, 'That they had a Common Council, and called it *Kyfr-y-then*.'

"The Saxons were not inferior to the *Britons* in this point; and story furnisheth us with more and plainer proofs. They brought this Liberty along with them, and it was not likely they should lose it, by transporting themselves into a country where they also found it. Tacitus reports it to have been generally the *German* Liberty; like unto the *Concio* of the Athenians and Lacedæmonians.

"They called their freemen *Frilingi*; and these had votes in the making and executing the general laws of the kingdom.

"In Ethelbert's time, after the monk Austin's insinuations had made his followers a part of the government, the *Commune Concilium* was *tam Cleri quam Populi*, 'as well Clergy as People.' In Ina's time, *suasu & instituto episcoporum, omnium senatorum & natu majorum sapientum populi*, 'Bishops, Lords, and Wise Men of the People.' Alfred after him reformed the former laws, *consulto sapientum*, 'by the advice of the sages of the kingdom.' Likewise matters of public and general charge, in case of war, &c. we have granted in the assembly, *Rege, Baronibus et Populo*; 'by the King, Barons and People.' And though the Saxon word properly imports 'the Meeting of Wise Men,' yet *All* that would come might be present, and interpose their like or dislike of the present proposition: As that of Ina, *in magna fervorum Dei frequentia*. Again, *Commune consilium seniorum populorum totius regni*; 'the Common Council of the Elders or Nobles, and People of the whole Kingdom.' The Council of Winton, Ann. 855. is said to be in the presence of the Great Men, *aliorumq; fidelium infinita multitudo*; 'and an infinite multitude of other faithful people'; which was nigh Four hundred years before the *Great Charter* was made.

"My last instance of the Saxon ages shall be out of the *Glossary* of the learned English Knight, H. Spelman: 'The Saxon *Wittangemole*, or parliament,' saith he, 'is a Convention of the *Princes*, as well *Bishops* as *Magistrates*, and the *Free People* of the kingdom'; And that the said *Wittangemole* consulted of the Common Safety in peace and war, and for the promotion of the common good.

clusions reached by the former and which at least had the right of expressing its approval or disapproval.<sup>1</sup> In Rome the patrician *comitia curiata* has already, in the earliest recorded epoch, supplanted any more primitive assembly, and meets for the purpose of giving advice on the affairs of state, particularly declarations of war, and to receive the new laws promulgated by the king.<sup>2</sup> Through Tacitus<sup>3</sup> we see among the earliest German tribes of which we have authentic account the assembly of "the whole body of the state," where "the will of the people ultimately decides" measures which the chiefs have the power of discussing and recommending.

Notwithstanding its prevalence and prominence among early peoples, the folkmoot, very early in its history, begins to lose its functions, and particularly those which we should now consider legislative. The reasons most frequently advanced for this decline are convenience and

"William of Normandy chose rather to rely upon the People's *Consent*, than his own *Power* to obtain the Kingdom. He swore to them to maintain their *Old Laws* and *Privileges*; they to him *Obedience*, for his so governing of them: For, as a certain author hath it, 'He bound himself to be *just*, that he might be *great*; and the people to submit to *justice*, that they might be *free*.' In his *Laws*, C. 55. 'We by the Common Council of the whole Kingdom, have granted the People's Lands to them in Inheritance, according to their Ancient Laws.'

"Matters of general expence upon the whole body of the people, were settled by this Great Council, especially in the *charge of arms*, imposed upon the subject. The law saith it to have been done by the *commune concilium* of the Kingdom.

"So W. Rufus and Henry the First, were received by the common consent of the people. And Stephen's words were, *Ego Stephanus, Dei gratia, assensu cleri & populi in regno Angliae electus*, &c. 'I, Stephen, by the Grace of God, and Consent of the Clergy and People chosen King of England,' &c. So King John was chosen, *tam cleri quam populi unanimi consensu & favore*; 'By the Favor and Unanimous Consent of the Clergy and People;' And his Queen is said to have been crowned *de communi consensu & concordii voluntate archiepiscoporum, comitum, baronum, cleri & populi totius regni*, i.e. 'By the common assent and unanimous good will of the Archbishops, Bishops, Counts, Barons, Clergy and People of the whole Kingdom.' King Edw. I also desired money of the *commune concilium*, or Parliament, 'As you have given in my time, and that of my progenitors, Kings,' &c.

"All which shows, that it was *antecedent* to the Great Charter; not the rights therein *repeated* and *confirmed*, but the *Act itself*.

"And King John's resignation of the crown to the Pope, being questioned upon some occasion in Edward III's time, it was agreed upon, 'That he had no *Power* to do it, without the Consent of the Dukes, Prelates, Barons and Commons.'"—"Select Works of William Penn" (London, 1771), 376 *et seq.*

<sup>1</sup> "Odyssey," XIV, 239; cf. Borgeaud, "Histoire du Plebiscite," 3, 7.

<sup>2</sup> Borgeaud, "Histoire du Plebiscite," 41.

<sup>3</sup> "De Moribus Germanie," XI *et seq.*; Kemble, "The Saxons in England," II, 185, 186. Cf. Hodgkin, "Italy and Her Invaders," III, 261, 262.

necessity. To Kemble<sup>1</sup> "the foundation of a representative system seems laid *à priori* and in the nature of things itself."

So Freeman<sup>2</sup> says:—

"The primary Assembly is the natural form of free government for the wandering band, for the group of households settled in their mark, for the tribe gathered within the walls of a city. It begins to break down even when it is applied to a *gau* or Canton of a larger size; it utterly breaks down when it is applied to a nation. The representative Assembly is as much the natural form of free government for the greater society as the primary Assembly is for the smaller."

But however natural this may appear as an "*à priori*" explanation, the historical fact seems to be that the folkmoot lost its functions through the growth of aristocratic and monarchical tendencies. Thus in Sparta the powers of the popular assembly (*ἀπέλλα*) were absorbed by the college of ephors.<sup>3</sup> In Rome the *comitia tributa*, last of the three successive popular assemblies, lost its functions in the absolutism of the empire. Even among the liberty-loving Germans the chieftain came, in course of time, to envy and appropriate "one of the most splendid prerogatives of the Roman Emperor—his

<sup>1</sup> "The Saxons in England," II, 191–193. Following are his reasons for this conclusion:—

"In a country overrun with forests, intersected with deep streams or extensive marshes, and but ill provided with the means of internal communication, suit and service even at the county-court must have been a hardship to the cultivator; a duty performed not without danger, and often vexatiously interfering with agricultural processes on which the hopes of the year might depend. Much more keenly would this have been felt had every freeman been called upon to attend beyond the limits of his own shire, in places distant from, and totally unknown to him; how, for example, would a cultivator from Essex have been likely to look upon a journey into Gloucestershire at the severe season of Christmas, or the, to him, important farming period of Easter? What moreover could he care for general laws affecting many districts beside the one in which he lived, or for regulations applying to fractions of society in which he had no interest? For the Saxon cultivator was not then a politician; nor were general rules which embraced a whole kingdom of the same moment to him, as those which might concern the little locality in which his alod lay. Or what benefit could be expected from his attendance at deliberations which concerned parts of the country with whose mode of life and necessities he was totally unacquainted? Lastly, what evil must have resulted to the republic by the withdrawal of whole populations from their usual places of employment, and the congregating them in a distant and unknown locality?"

Cf. Fiske, "American Political Ideas," 69, 70; Hodgkin, "Italy and Her Invaders," III, 260.

<sup>2</sup> "Comparative Politics," 221, 222.

<sup>3</sup> Borgeaud, "Histoire du Plebiscite," 9.

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legislation."<sup>1</sup> Later still it was the monarch under whom the liberties of the Netherlands were treated with contempt,"<sup>2</sup> who summoned the first States-General.

seau<sup>3</sup> has an explanation which, if not altogether his, is at least suggestive and deserving of thoughtful consid-

soon as the service of the state ceases to be the principal business of the people," he says, "and they prefer to render aid with their purses rather than with their persons, the state is already on the brink of ruin. Is it necessary to march to the front, they pay troops and remain at home; is it necessary to go to the council, they send deputies and remain at home. As a result of indolence and wealth, the people no longer have soldiers to enslave their country and representatives to protect it. The decline of patriotism, and active pursuit of private interests, the increase in the size of states,<sup>4</sup> conquests and abuses of government, have suggested the idea of deputies or representatives of the people in the assemblies of the

It has been the fashion, nevertheless, in some quarters to bestow praise upon this *député* system of legislation which, in place of the *folk-moot*, though generally long after its disappearance,<sup>5</sup> has

<sup>1</sup> See, "Law and Politics in the Middle Ages," 18.

<sup>2</sup> See, "The History of the Netherlands," 185.

almost everywhere been substituted. Speaking of the origin of the delegate system in the country where it seems to have appeared first in the post-classical age,<sup>1</sup> John Fiske declared:<sup>2</sup>—

"It was one of the greatest steps ever taken in the political history of mankind. . . . In these four discreet men sent to speak for their township in the old county assembly, we have the germ of institutions that have ripened into the House of Commons and into the legislatures of modern kingdoms and republics."

A later eulogist<sup>3</sup> is still more pronounced.

"We believe," he says, "that a representative form is the best. Its theory is that as men in their private affairs usually, all things being equal, choose the best tailor, the best shoemaker, the best lawyer, and the best doctor they can get, having regard, not only to their knowledge and their skill, but also to their honesty, they will use like discretion in choosing their political agents."

were then still recent, been powerful, but in these countries they had been, or were about to be, abolished, and in each case the triumph of the crown was due to the favor of the people."—Dicey, "Will the Form of Parliamentary Government be Permanent?" *Harvard Law Review*, XIII, 72.

In England the delegate parliament dates from the thirteenth century, but even its earliest appearance was after direct popular legislation had been in vogue for ages.

<sup>1</sup> Mr. Hannis Taylor in his "Origin and Growth of the English Constitution," 429, observes that "the representative principle . . . has been called 'a Teutonic invention.'" But it may well be questioned if the principle was not applied by the classical nations. Besides the Amphyktionic Council (conceded by Fiske in connection with the passage quoted in the text to afford an Hellenic instance) and the Achaian League, which is even more in point, was not the primitive Roman tribune truly the representative of his plebeian constituency when, to voice its demands, he went before the patrician Senate? Or, when, in the exercise of his extraordinary power of intercession, he placed a check upon the entire legislative machinery of the republic? See Ihne, "History of Rome," I, 149, 151.

Rousseau, however, would call the tribunes "deputies" rather than "representatives."

"It is very singular," he says, "that in Rome, where the tribunes were so sacred, it was not even imagined that they could usurp the functions of the people, and in the midst of so great a multitude they never attempted to pass, of their own accord, a single *plebiscitum*. . . . To explain, however, in what manner the tribunes sometimes represented it (the nation), it is sufficient to understand how the government represents the sovereign. The law being nothing but the declaration of the general will, it is clear that in their legislative capacity the people cannot be represented; but they can and should be represented in the executive power, which is only force applied to law. . . . It is certain that the tribunes, having no share in the executive power, could never represent the Roman people by right of their office, but only by encroaching on the rights of the Senate."—"Contrat Social," Chap. XV.

<sup>2</sup> "American Political Ideas," 70, 71.

<sup>3</sup> President U. M. Rose in his annual address before the American Bar Association, 1902; *American Bar Association Reports*, XXV, 239.



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is this merely the traditional note of Anglo-Saxon optimism. M. Vachet<sup>1</sup> was hardly less of a panegyrist when he wrote:—

the apex of free and democratic institutions is the parliamentary system. It is this system that a country governs itself. Thanks to it all that a nation has of science and experience centred in the elective chambers makes the

M. Vacherot<sup>2</sup> when he declared:—

parliamentary government is more necessary to republican democracy than the rest of the system."

Keen observers of political tendencies have noticed of late a reaction from the favorable opinion once entertained of decentralization.<sup>3</sup>

At present, as far as one can see," says Godkin, "the democratic world is full of distrust and dislike of its parliaments, and submits to them only under the pressure of stern necessity. . . . They [democracies] seem to be getting tired of the representative system. In no country is it receiving the praises it received forty years ago."<sup>4</sup>

Mr. Vachet has said:—

American people are fairly content with their executive and judicial branches of government, but they feel that their law-making bodies have

features of the closing years of the nineteenth century. In most countries, as we have already seen, the parliamentary system means constantly shifting government, ruined finances, frequent military revolts, the systematic management of constituencies. In most countries it has proved singularly sterile in high talent. It seems to have fallen more under the control of men of an inferior stamp; of skilful talkers or intriguers, or sectional interests of small groups; and its hold upon the affection and respect of nations has visibly diminished."

Mr. Dicey writes in a similar vein:—

"Faith in Parliaments," he declares,<sup>1</sup> "has undergone an eclipse; in proportion as the area of representative government has extended, so the moral authority and prestige of representative government has diminished . . . The proposals for elaborate schemes of proportional representation, the denunciation of the party system by brilliant and weighty writers who express in language which few men can command sentiments which thousands of men entertain, all bear witness to the widespread distrust of representative systems under which it, occasionally at least, may happen that an elected Parliament represents only the worst side of a great nation."

In this distrustful and reactionary mood, modern democracy is groping its way toward some system by which it may legislate for itself. As Mr. Godkin observes:—

"There are signs of a strong disposition, which the Swiss have done much to stimulate, to try the 'referendum' more frequently, on a larger scale, as a mode of enacting laws."<sup>2</sup>

Rousseau anticipated all these utterances; more than a century previous he had written:—

"The deputies of the people . . . are not and cannot be its representatives; they are only its commissioners and can conclude nothing definitely. Every law which the people in person have not ratified is invalid; it is not a law. . . . The idea of representatives is modern; it comes to us from feudal government, that absurd and iniquitous government, under which mankind is degraded and the name of man dishonoured."<sup>3</sup>

We need not now pause to consider whether these criticisms of the delegate system are justified. If the summary attempted above is correct, that system is but a stage in the evolution of democracy, — perhaps a necessary stage for all nations travelling toward that goal and even a final stage for some, since advancement beyond it implies a capacity for self-government not hitherto demonstrated by

<sup>1</sup> 13 *Harvard Law Review*, 73, 74.

<sup>2</sup> "The Decline of Legislatures," *Atlantic Monthly*, LXXX, 51.

<sup>3</sup> "Contrat Social," Chap. XV.

all. But the complete evolution of legislative sovereignty thus appears to constitute a cycle. Beginning with a system more or less popular, we find this succeeded by a monarchical and then a delegate system which, in turn, are supplanted by one completely direct and popular. To show in detail how this cycle, so far as completed, has been accomplished, is the principal theme of this work.

## CHAPTER II

### SURVIVALS OF POPULAR LAW-MAKING

#### A. *Persistence of the Folkmoot Idea*

WHILE the folkmoot generally declined and disappeared, forms and survivals of it continued much longer and throughout much wider areas than is commonly supposed. Thus in Italy the tradition of the Roman popular assemblies appears to have lasted all through the Middle Ages and to have been sufficiently strong toward the close of that era to assist in reviving the original in the form of the *Parlamento*, or general assembly of the Italian communes.<sup>1</sup> The Basque folkmoot of northern Spain, which met under the historic Guernica oak<sup>2</sup> in Vizcaya, enacted *fueros* for more than five centuries<sup>3</sup> and only lost its functions finally in 1876. Even in Visi-

<sup>1</sup> Wolfson, "The Ballot and Other Forms of Voting in the Italian Communes," *American Historical Review*, V, 3.

<sup>2</sup> "Oak of Guernica! Tree of holier power  
Than that which in Dodona did enshrine  
(So faith too fondly deemed) a voice divine,  
Heard from the depths of its aerial bower,  
How canst thou flourish at this blighting hour?  
What hope, what joy, can sunshine bring to thee,  
Or the soft breezes from the Atlantic sea,  
The dews of morn, or April's tender shower?  
Stroke merciful and welcome would that be  
Which should extend thy branches on the ground,  
If never more within their shady round  
These lofty-minded Lawgivers shall meet,  
Peasant and lord, in their appointed seat,  
Guardians of Biscay's ancient Liberty."

— WORDSWORTH, "The Oak of Guernica" (1810).

<sup>3</sup> "The lawmakers of Vizcaya were duly chosen by their fellow-nobles for every Basque held the rank of *hidalgo* or son of somebody. The deputies met every two years in the village of Guernica, sitting on stone benches in the open air beneath the sacred oak and there elected the *Señores de Vizcaya*. Even the kings of Spain were allowed no grander title, but had to come to the Tree of Guernica, at first, in person, later by deputy, and there swear to observe the *fueros*. To this green shadow came the peasant from his lonely farmhouse, high on the mountain side, to answer before

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Spain, laws were "made in the national councils held at [blank], in concert with the bishops and grandees of the realm, and [blank] assent," though "more frequently presumed than expressed, [blank] people."<sup>1</sup>

The popular assembly continued, among the Teutonic peoples of [blank] Tacitus writes, far down into historic times. We find it [blank] the north Germans of Saxony<sup>2</sup> and the south Germans of [blank] la.<sup>3</sup> According to Laveleye<sup>4</sup> in Westphalia and Hanover until [blank] recently "the inhabitants assembled to deliberate on all that [blank] ned cultivation, and to determine the order and time of the [blank] s agricultural operations." In the German provinces of the [blank] ish Empire general assemblies were held annually under [blank] emagne, which, while no longer of that ancient popular sort, [blank] et survivals of the old.<sup>5</sup>

[blank] is found in Friesland<sup>6</sup> and Holland,<sup>7</sup> continuing in the form of

[blank] s to such charges as might be brought against him; for within the sanctuary [blank] ome the law could lay no hand on him or his.

[blank] was the Carlist wars that changed all this. The *fueros*, of which a list dating [blank] 42 is still extant, granted the Basque provinces a Republican Constitution that [blank] realized an ideal democracy with immunity for taxes save for their own needs [blank] n military service beyond their own boundaries. But when the dynastic strife [blank] ut, the Basques put on the white cap of Don Carlos and bore the brunt of the

the markmoot<sup>1</sup> and as the assembly of burghers.<sup>2</sup> In England, laying aside the controversy as to the character of the tungemote,<sup>3</sup> the shire-moot, in Kent at least, seems to have considered and approved laws as late as a century before the Conquest,<sup>4</sup> while it is claimed that a popular assembly exercised similar functions in London much later.<sup>5</sup>

The popular assembly is found among the Scandinavians, both in continental Europe<sup>6</sup> and in Iceland,<sup>7</sup> lasting in the latter country down to the nineteenth century.<sup>8</sup> Not less important and hardly less tenacious was its foothold among the Slavs.<sup>9</sup>

<sup>1</sup> "Formerly the partners in the *mark* met once a year, on St. Peter's day, in a general assembly, *holling*. They appeared in arms; and no one could absent himself, under pain of a fine. This assembly directed all the details as to the enjoyment of common property; appointed the works to be executed; imposed pecuniary penalties for the violation of rules, and nominated the officers charged with the executive power, the *markenrighter* and his assessors." — Laveleye, 283.

<sup>2</sup> "In the 13th century, when any greater matter had to be discussed in a city, all citizens were summoned by ring of the great bell to the public square, and there decided the question by democratic vote." — "Encyclopædia Britannica," XII, 75.

<sup>3</sup> Professor W. J. Ashley in an article on "The Anglo-Saxon Township," *Quarterly Journal of Economics*, VIII, 345, holds that there is no authentic Saxon evidence of "a township assembly of any sort"; that the "tun" was a territorial division and had probably not a single constitutional function; that the notion of it as a starting-point of representation rests entirely upon an improper construction of the laws of Henry I, — an unauthorized compilation of 1108–1118 — and that the manor and parish meetings are not necessarily survivals of the "tun" assemblies.

Stubbs, however, had reached the conclusion that the tungemotes "may be safely understood to have had the power of making their own by-laws." He adds, "The word '*by-law*' itself is said to mean the laws enacted by the township, the '*by*' of the Northern shires." — "Constitutional History of England," I, sec. 43.

<sup>4</sup> Stubbs, *Id.*, secs. 50, 76; Kemble, "The Saxons in England," II, 233. Cf. *post*, 15, 16.

<sup>5</sup> "*Barones* was a term which was commonly applied to the burgesses or citizens of the city of London in charters and other public documents down to the time of Edward I. . . . Now these citizens met in their assembly and court called the hustings. . . . In this court and assembly alone the *cives* had and persistently claimed the right of suing and being sued, and there they elected their officers and made ordinances and laws, etc. . . . They seem to have retained some of those rights of regulating the laws within their county which all counties originally possessed. They were rulers, law-makers, and *judices*." — Lewis, "Ancient Laws of Wales," 361, 364, citing "Munimenta Gildhallae, Londoniensis," II (*Liber Custumarum*) (Edited by Riley), 86–88.

<sup>6</sup> Gomme, "Primitive Folkmoets," 28 *et seq.*

<sup>7</sup> Bryce describes the Icelandic "things" as follows: "Ordinary lawsuits and questions of local interest were determined in these minor things, while graver suits, or those in which the parties belonged to different things, or where it was sought to reverse the decision of a local thing, as well as all proposals for alterations of the general law, were brought before the Althing, at its annual meeting in June." — "Studies in History and Jurisprudence," 273.

<sup>8</sup> *Id.* 272–274.

<sup>9</sup> Kovalevsky, "Russian Political Institutions," 13 *et seq.*; Laveleye, "Primitive Property," 111.

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speaking of the Russian principalities in the period from the tenth to the thirteenth centuries, a recent writer of that nationality:<sup>1</sup> —

The people kept its ancient right of discussing the current affairs of the land in folkmotes, and even of choosing its rulers, but on condition of selecting the ruler from among the members of the dynasty of Rurik. The folkmotes were known in old Russia under the name of Veche. The chronicles, when they speak of these assemblies, briefly note the presence of all the citizens summoned to these assemblies, briefly note the presence of all the citizens of a definite urban division. Expressions such as the following are also more than once met with in the course of the narrative: 'The men of our land,' 'the whole land of Galich,' and so on. Hence, it is evident that we have to deal with a thoroughly democratic assembly. . . . The competence of the Russian folkmote was as wide as that of similar political assemblies among the western European Slavs. More than once it assumed the right of choosing the chief ruler of the land. . . . The new ruler was admitted to the exercise of sovereign power only after having subscribed to a sort of contract by which he took upon himself the obligation of preserving the rights of those over whom he was called to rule. . . . These compacts or covenants between prince and people, so far as they are known to us by the few examples preserved by the chronicles of Novgorod, are a kind of constitutional charter securing to the people the free exercise of its political rights, such as the right of the folkmote to discuss public affairs, to elect the ruler of the state. . . . Questions of war and peace were regularly decided by it. No war could be begun but with the consent of the people.

disappeared. One of these was the fiction that the people still continued a part of the law-making body, though their privilege might not actually be exercised. In the Frankish Empire in Charlemagne's time the folkmoot had shrunken to an assembly convened not oftener than twice a year.<sup>1</sup> In one of these — the spring assembly — the common people are still allowed to be present,<sup>2</sup> and though they have comparatively little to say in the affairs of state or the making of laws,<sup>3</sup> the Frankish assembly is nevertheless characterized by a great historian<sup>4</sup> as "the mouthpiece of the state in which the coöperation of ruler and people was necessary in all matters of first importance."

In England, where the folkmoot declined more rapidly than on the continent and where its functions were absorbed by the highly centralized witenagemote, the fiction at least of popular participation and approval was retained up to the time of the Norman Conquest.

"There is still reason to suppose," observes Kemble,<sup>5</sup> "that the people themselves, or some of them, were very often present," and that "the people who were in the neighbourhood, who happened to be collected in arms during a sitting of the witan or who thought it worth while to attend their meeting, were very probably allowed to do so, and to exercise at least a right of conclamation."

So Lappenberg<sup>6</sup> declares: —

"There is no reason extant for doubting that every thane had the right of appearing and voting in the witenagemót, not only of his shire, but of the whole kingdom, without, however, being bound to personal attendance, the absent being considered as tacitly assenting to the resolutions of those present."

Some of the laws themselves contain expressions indicating that popular attendance and participation were not altogether a fiction. Following is the preamble to the dooms of Wihtraed (691-725): —

"In the reign of the most clement king of the Kent-ishmen, Wihtraed, in the fifth year of his reign, the ninth indiction, the sixth day of Rugern, in the place

<sup>1</sup> Waitz, "Die Verfassung des Fränkischen Reichs" (Berlin, 1883), Dritter Band, bl. 581 *et seq.*; Stubbs, "Constitutional History of England" (3d Ed., Oxford, 1880), I, 122 *et seq.*; Hodgkin, "Italy and her Invaders" (Oxford, 1885), III, 260.

<sup>2</sup> Stubbs, I, 123.

<sup>3</sup> Waitz, Dritter Band, bl. 584. Stubbs (I, 123) points out that the functions of the prince and people have become interchanged since the days of Tacitus, the former being now assembled "*Propter consilium ordinandum*," the latter "*idem consilium suscipiendum*" and sometimes "*pariter tractandum*."

<sup>4</sup> Waitz, Dritter Band, bl. 596.

<sup>5</sup> "The Saxons in England" (Rev. Ed., London, 1876), II, 237, 238. See, however, Beard (*Pol. Sc. Quar.*, XXIII, 341, who says the theory is "without substantiation."

<sup>6</sup> "History of England," II, 387.



which is called Bergham-styde, where was assembled a deliberative convention of the great men: there was Birhtwald archbishop of Britain, and the fore-named king; also the Bishop of Rochester, the same was called Gybmund, was present; and *every degree of the church of that province spoke in unison with the obedient people*. There the great men decreed, with the suffrages of all, these dooms and added them to the lawful customs of the Kent-ishmen, as it hereafter saith and declareth."<sup>1</sup>

In theory then, as well, to some extent, as in practice, the witenagemote still included the people, and its powers were correspondingly exercised by them. Now the approval of laws framed by the king was one of the important, if not frequently exercised,<sup>2</sup> functions of this witan. "The king," says Bishop Stubbs,<sup>3</sup> "never legislates by his own ordinance."

Throughout Anglo-Saxon history, from Ini<sup>4</sup> (688-726) and Alfred<sup>5</sup> (871-901) to Athelstan<sup>6</sup> (925-940), Edgar<sup>7</sup> (959-975), and Ethelred<sup>8</sup> (978-1016), and even Canute<sup>9</sup> (1017-1035), the laws recite that they are the joint work of the king and the witan, the latter perpetuating the idea of the ancient popular assembly.

Another mark of the folkmoot's influence, analogous to, and yet distinct from, that just discussed, was what Stubbs calls<sup>10</sup> the "recognition of the importance of the popular reception of a law." As Kemble states it,<sup>11</sup> "The whole principle of Teutonic legislation is, and always was, that the law is made by the constitution of the king and the consent of the people." This statement is indeed hardly more than a paraphrase of an expression of one of Charlemagne's grandsons,<sup>12</sup> and however much that prince may have ignored the

<sup>1</sup> Thorpe, "Ancient Laws and Institutes of England" (1840), I, 37.

<sup>2</sup> "Legislation constituted but a small portion of the ordinary business transacted by the Imperial Witenagemot." — Palgrave, "Rise and Progress of the English Commonwealth" (London, 1832), I, 639.

<sup>3</sup> "Constitutional History of England" (3d Ed., Oxford, 1880), I, 194.

<sup>4</sup> Thorpe, "Ancient Laws and Institutes of England" (1840), I, 102.

<sup>5</sup> Id. 59. Cf. Besant, "Story of King Alfred" (New York, 1901), 133.

<sup>6</sup> Thorpe, I, 195.

<sup>7</sup> Id. 263.

<sup>8</sup> Id. 281, 293, 305, 341.

<sup>9</sup> Id. 359, 377.

<sup>10</sup> "Constitutional History of England" (3d Ed., Oxford, 1880), I, 116.

<sup>11</sup> "The Saxons in England" (Rev. Ed., London, 1876), II, 236.

<sup>12</sup> "Das Gesetz, sagt ein enkel Karls, enstent durch Zusstimmung, des Volks und Festsetzung des Königs." — Waitz, "Deutsche Verfassungs Geschichte" (Berlin, 1883), Dritter Band, bl. 605, citing Edict. Pist. 864, c. 6, S. 490.

people in practice, in theory he sought their formal consent to the enactment of all his laws. The most famous part of his legislation consisted of what is known as capitularies — “those marvellous monuments of the energy and far-reaching, all-embracing statesmanship of the great Emperor.”<sup>1</sup> Yet even these were brought before the people for their approval,<sup>2</sup> especially where they consisted of additions to the ancient laws.<sup>3</sup> To accomplish this, Charles employed another famous institution, — the *missi dominici*, — “who were, so to speak, the staff officers of his administration, sent into every province of his Empire to control the actions of the local courts in the interests of peace and righteousness.”<sup>4</sup> Thus in 803, after making certain additions to the Salic law, he instructs the *missi dominici* as follows:—

“Let the people be interrogated touching the articles which have recently been added to the law; and after they have all consented to them, let them affix to the said articles their signature in confirmation.”<sup>5</sup>

That the confirmation mentioned here will be given is, apparently, assumed, but the most significant fact is that it is considered essential.

The same idea prevailed, though less prominently, in other continental states founded by Germanic tribes. The Lombard king Rothari proclaims his code of 643 in the assembly of his chiefs at Pavia, “acting herein with the advice and by the consent of the nobles, the judges, and all our most prosperous army.”<sup>6</sup> Here the army, which may be supposed to have included the able-bodied men of the Lombard nation, is treated as a part of the law-making power.

<sup>1</sup> Hodgkin, “Italy and her Invaders” (Oxford, 1899), VIII, 288. The author adds: “The Capitularies are not and do not pretend to be a code. They are far more concerned with administration than with legislation properly so called, and if they must be compared at all, should rather be with the minutes or memoranda of the English Privy Council than with the Codes of Justinian or Napoleon.” See Guizot, “History of Civilization” (Hazlitt’s Trans., London, 1873), II, Lecture 21, for what Hodgkin pronounces a “more helpful” discussion of the capitularies than any other.

<sup>2</sup> Waitz, “Die Verfassungs Geschichte” (Berlin, 1883), Dritter Band, bl. 595, 610, 612; Stubbs, “Constitutional History,” I, 116.

<sup>3</sup> Guizot, “History of Civilization” (Hazlitt’s Trans., London, 1873), II, 215.

<sup>4</sup> Hodgkin, VIII, 207.

<sup>5</sup> Capitularies An. 803, sec. 19, i, 394; Guizot, “History of Civilization” (Hazlitt’s Trans., London, 1873), II, 215.

<sup>6</sup> Hodgkin, “Italy and her Invaders” (Oxford, 1895), VI, 236.

An instance of what the historians agree in considering<sup>1</sup> a practice in England similar to that in Charlemagne's empire as above described occurs as late as the reign of Athelstan (925-940). The bishop and all the thegns of Kent "eorl and ceorl" return their thanks to the king for what he has been pleased to ordain respecting their peace and to inquire and consult concerning their advantage since great was the need of them all both rich and poor. And they declare that they have taken this in hand with as much diligence as possible with the aid of those wise men whom the king had sent them.<sup>2</sup>

"I do not believe Æthelstan's witan in Wessex to have passed a law," says Kemble,<sup>3</sup> "and then his witan in Kent to have accepted or confirmed it. I believe his witan from all England to have made certain enactments, which the proper officers brought down to the various shires, and in the shiremoots there took pledge of the shire-thanes that they accepted and would abide by the premises; just as in the case quoted."

Elsewhere, referring to the same document, he says:<sup>4</sup>—

"The passage in the text seems to presuppose an interchange of oaths and pledges between the king and witan themselves; and even those who had no standing of their own in the folcmót or scírgemót were required to be bound by *personal* consent. . . . We have seen one way in which that consent was obtained, viz. by sending the *capitula* down into the provinces or shires, and taking the *wed* in the shiremoot."

Again, in the reign of the same king (Athelstan), it is stated—

"that all the witan gave their pledges [weds] altogether to the archbishop, when Ælfeah Stybb and Brithnoth, Odda's son, came to meet the gemot, by the king's command; that each reeve should take the wed in his own shire that they would all hold the frith [peace] as King Athelstan and the witan had counselled it."<sup>5</sup>

And the collection of laws known as "*Judicia Civitatis Loundoniae*," is prefaced by the statement that these laws "were confirmed by the oaths and pledges of all, both *eorls* and *churls*."<sup>6</sup> These,

<sup>1</sup> See Kemble, "The Saxons in England" (Rev. Ed., London, 1876), II, 233. Stubbs, "Constitutional History of England" (3d Ed., Oxford, 1880), I, 115, refers to this as showing that "some shadow of legislative authority seems to have remained to it (the shiremoot) in the time of Athelstan." Cf. Id. 195.

<sup>2</sup> The Latin text is given in Thorpe, "Ancient Laws and Institutes of England" (1840), I, 216.

<sup>3</sup> "The Saxons in England" (Rev. Ed., London, 1876), II, 234, note.

<sup>4</sup> "The Saxons in England" (Rev. Ed., London, 1876), II, 236, 237.

<sup>5</sup> "*Judicia Civitatis Loundoniae*," Cox, "Antient Parliamentary Elections" (London, 1868), 34.

<sup>6</sup> Id.

and other passages from the Saxon laws, lead Cox to declare that "the acts of the witenagemote were considered to acquire force from the oath which the people took to observe them."<sup>1</sup>

The notion that an English law was not completely in force until it had received the assent and confirmation of the people survived even the shock of the Norman Conquest and lasted down to modern times. "When parliamentary institutions were established," says Cox,<sup>2</sup> "the practice prevailed for many centuries of sending the statutes at the end of each session to be proclaimed by the sheriff in each county court." And when, after a prolonged and bitter struggle, the Great Charter was at last wrung from the unwilling John, it "was sent down into the country and sworn to at hundred-motes and town-motes under order from the king."<sup>3</sup> We shall find the same course followed more than four centuries later with reference to the Solemn League and Covenant which bound England with her northern neighbor.<sup>4</sup> These were no accidental or isolated instances. They recalled a time when the consent of the people, which had then become largely a form, had been a reality, and they presaged a time when the reality should once more supplant the form.

### *C. The Craft Guilds and their Ordinances*

Bishop Stubbs<sup>5</sup> calls attention to the fact that "the national customs which belong to the lowest range of machinery are subject to the fewest organic changes," and it is in the local and obscure rather than the conspicuous and highly developed institutions that we are to look for the longest survivals of the idea embodied in the folkmoot. We have seen<sup>6</sup> that actual popular legislation in England lasted longest in the local bodies. After it ceased there it continued to be practised in certain organizations which, though unofficial, played an important part in the social and economic life of England from the

<sup>1</sup> "Judicia Civitatis Londoniae," Cox, "Antient Parliamentary Elections" (London, 1868), 34.

<sup>2</sup> Id.

<sup>3</sup> Pearson, "History of England during the Early and Middle Ages" (London, 1867), II, 94, 95. The Charter was republished upon the accession of Henry III (Stubbs, "Constitutional History" [2d Ed.], II, 21), and the same author (I, 116) refers to the measures taken for its publication and preservation as an example of the notion discussed in the text.

<sup>4</sup> See *post*, Chap. VI.

<sup>5</sup> "Constitutional History of England" (3d Ed., Oxford, 1880), I, 91.

<sup>6</sup> *Ante*, 13, 15.

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period on to the sixteenth and seventeenth centuries and were, by the prototypes of our modern corporations, both private municipal, and appear to have been an offshoot of the primitive civil community.

regards Guilds," observes Maine,<sup>1</sup> "I certainly think . . . that they have been much too confidently attributed to a relatively modern origin; and much of them, and much which is common to all of them, may be suspected to have grown out of the primitive brotherhoods of co-villagers and kinsmen. Anybody who, with a knowledge of primitive law and history, examines the internal mechanism and proceedings of a London Company will see in many of them plain traces of the ancient brotherhood of kinsmen, 'joint in food, and estate.'"<sup>2</sup>

It was natural that organizations thus connected should preserve many features of the old order and among these was the system of guild laws. The guild statutes are the most interesting, as they are the most abundant, remains of the institutions themselves. They contain many phases of human interest and duty, in some respects they take the place of modern municipal regulations, and are an invaluable source for the history of civilization in the Middle Ages. Valuable as they are in subject-matter, their chief bearing upon our present theme lies in the manner of their enactment. The guilds

Those of Exeter declare:—

"Thes beth the Ordenaunce made and astabled of the fraternyte of crafte of Taylorys, of the Cyte of Exceter, by asente and consente of the fraternyte of crafte afforesayd y-gedered there to-gedere, for ever more to yndewre."<sup>1</sup>

A guild of Lynn established in 1376 declared:—

"Theis ordennauns were ordeyned be on assent of alle the bretheryn and sisteryn of this gild, to meyntene and fulfillyn theis forn statu."<sup>2</sup>

At North Lenne the recital was:—

"Yeis am ye ordynnaunces of our Gylde, ordeynd be alle the hol fraternite."<sup>3</sup>

The preamble to the ordinances of a Stratford guild was:—

"These are the ordinances of the brethren and sisteren of the Gild of the Holy Cross of Stratford."<sup>4</sup>

Following are other titles:—

"The Ordinances of the bretheren and sisteren of the Gild."<sup>5</sup>

"Statutes of the Guild, ordained by the pleasure of the Burgesses."<sup>6</sup>

An ordinance of the Tailor's Guild of Exeter closes thus:—

"And here volowyth te namys off them ht dyd a-sentt to thys ordynans, before and in he xxiiij day of June, in the yere above said."<sup>7</sup> The names and occupations of the signers follow.

Several of the ordinances contain this provision:—

"Also, tat ter schal non of te wardeyns make none newe statutes ne newe ordinances wtoute assente of alle te bretherhede, and tat it be done on te day of here assemble."<sup>8</sup>

Another clause common to many ordinances is one requiring them to be read over and assented to by newly admitted members.<sup>9</sup>

Hibbert,<sup>10</sup> commenting on this phase of guild life, observes:—

<sup>1</sup> Toulmin Smith, "English Gilds" (London, 1870), 312.

<sup>2</sup> Id. 48.

<sup>3</sup> Id. 103.

<sup>4</sup> Id. 215.

<sup>5</sup> Guild at Coventry, Id. 228.

<sup>6</sup> At Berwick-upon-Tweed, Id. 338.

<sup>7</sup> Id. 329.

<sup>8</sup> Ordinances of Guild of St. Katherine and of Guild of Sts. Fabian and Sebastian, London, Id. 8, 11.

<sup>9</sup> Id. 159, 161, 72, 88.

<sup>10</sup> "Influence and Development of English Guilds" (Cambridge, 1891), 48, 49.

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education obtained by the framing of their own ordinances was also gain to the townsmen. They provided for their peculiar needs in their own way, not always we may say in the best way, but in that which they, for the special requirements of the case, considered the best. Each who in drawing up those regulations would feel that a certain share of responsibility was placed upon him to see that they were kept. The constitutional importance of this training, in imparting an appreciation of the responsibilities and duties which devolve on those who frame regulations, was not unimportant."

## CHAPTER III

### THE CHURCH COVENANT

#### *The Anabaptists and their "Bund"*

"THAT department of modern political thought which may be broadly called democratic," says a recent writer,<sup>1</sup> "takes its rise in the sixteenth century."

Another adds:—

"Modern democracy is the child of the Reformation. . . . To make the religious revolution lawful, it was necessary to proclaim these two principles [free inquiry and the priesthood of all believers] which contained in them the germs of the political revolution."<sup>2</sup>

But it may well be asked if the freedom and equality here referred to were not the underlying and fundamental ideas of the folk-moot? Moreover, it is not at all certain that the expression of these principles in the form now about to be discussed—the church covenant or "bund"—did not actually antedate the Reformation.<sup>3</sup> Finally, if modern democracy, as a political fact, be exclusively "the child of the Reformation," why did it not generally accompany that movement? Why, in other words, did not democracy begin with Luther in Germany? or, better still, with Wyclif in England or Huss in Bohemia? Why did it wait until, as Dr. Borgeaud himself so skillfully shows, the Reformation reached a country where democratic institutions had never disappeared, but were maintained in their pristine vigor from primitive times? It would seem to be more correct

<sup>1</sup> Gooch, "History of Democratic Ideas in the Seventeenth Century," 1. Cf. Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly* (1891), VI, 229.

<sup>2</sup> Borgeaud, "Rise of Modern Democracy in Old and New England," 2, 3.

<sup>3</sup> "The Church covenant idea may even have been made use of among the various Christian brotherhoods, of which, in the century preceding the Reformation, and even farther back, we find many traces."—Burrage, "The Church Covenant Idea," 13.



to treat this phenomenon of the sixteenth century as a revival than as a birth, considering it quite as much a product of soil and conditions as of the forces acting upon them.

It is natural, however, that in times of sectarian strife and persecution members of the weaker sect should seek to give formal expression to the closer union which results from the sense of common danger and interdependence. In the days of Trajan the Christians "bound themselves by an oath at their meetings."<sup>1</sup> At the period of the Reformation, this notion assumes the form of the "bund" or covenant. This was not a mere announcement of theological dogmas; it was rather a declaration of the ties which bound together the members of the sect and an agreement on their part to pursue a certain course of conduct.<sup>2</sup> A typical instance of this occurs within a decade after Luther formally launched the Reformation by nailing his famous theses on the church door at Wittenberg. The *Wiedertäufer* (Anabaptists) of Schlatten am Randen put forth an instrument entitled the "Seven Articles . . . Agreed to on February 4, 1527." All but two of the articles are introduced by the phrase "*seint wir vereinigt worden*" (we are become united), and the fourth, which is especially significant, is as follows:<sup>3</sup>—

"Zum vierden: Seint wir vereynigt worden von der absinderung von dem bösen vnd vom argen, das der teuffl in der welt gepflanzt hat, also das wir nit gemeinschaft mit inen haben, vnd mit inen (nit) laufen in die gemenge irer greül. — Nun ist vns auch das gebot des herren offenbar, in welchem er vns haist abgesindert sein, wellen wir seine süne vnd töchter sein; weiter vermant er vns daruml: von babilon vnd dem Irdischen Egipto aus zu geen, das wir nicht thailhaftig werden irer qual vnd leiden, so der herr über sie füren wirt. Dis gräuel, welche wir meiden sollen — in den werden vermaint alle babstliche vnd widerbäbstliche werckh vnd gotes dienste, versamlung, kürchgang, . . . vnd andere mer dergleichen, die dan die welt für hoch helt; — von diesem allem sollen wir abgesindert werden, vnd kain tail mit solchem haben, denn es sein eitel gräuel, die vns verhasst machen vor vnserem Christo Jesu, welcher vns entledigt hat von der dienstbarkeit des fleisches."

<sup>1</sup> Letter of Pliny the Younger ("C. Plinii Caecelii Secundi Epistolarum Libri Decem et Panegyricus" (Parisiis, 1823), Epistola XCVII, 199, 200.

<sup>2</sup> Dr. Crooker in his monograph on "The Unitarian Church," 15, aptly characterizes the covenant as afterward developed among the American churches as "the declaration of a spiritual purpose or a life promise . . . not a creed, — a set of beliefs, — but a statement of religious motives."

<sup>3</sup> Quoted from Burrage, "The Church Covenant Idea," 16, 17. An abridged text of the articles is given in Beck, "Die Geschichts-Bücher der Wiedertäufer in Oesterreich-Ungarn" (1883).

["In the fourth place: We have agreed [have covenanted] concerning separation from evil and wickedness, which the devil has planted in the world, namely that we will not have association with them, and will [not] walk with them in their many abominations. Now also to us is the command of the Lord manifest, in which he calls us to be separated [from the world], if we wish to be his sons and daughters; further he warns us therefore: to flee from Babylon and the land of Egypt, that we share not their torments and sorrows, which the Lord will bring upon them. The abominations, which we shall avoid by which are meant all papal and anti-papal work and church services, gathering[s], church-way[s], . . . and still other of the like, which the world now holds in high esteem; from all this shall we be separated, and have no part with such, for they are empty abominations, which make us hateful before our Christ Jesus, who has released us from the bondage of the flesh."]

We have here, then, the church covenant in its crudest and most primitive form. Some features which are clearly expressed as the instrument comes into wider use are here only implied. Its final characteristics are but faintly foreshadowed. Enough appears, however, even in this simple document, to challenge careful attention. It was an agreement among equals; not something imposed or enjoined upon inferiors. It acquired its force from the voluntary consent of the members. It purports to bind only those who "have agreed" and consequently it becomes effective as to each individual only when he agrees. Finally, it is a formal written compact not only evidencing the organic union of its adherents, but binding them to a specified mode of life.

From this period on the idea of the church "bund" or covenant becomes common and instances of it are found in various countries.<sup>1</sup> We shall encounter it often in these pages, and we shall do well to watch its development, follow its changing character and widening scope, study its application to civil affairs, and trace its gradual transformation into a political instrument. For it is probable that in the church covenant we find the germ of the popular written constitution as it has been evolved in America. That instrument, it is certain, is a product of the era of modern democracy, and for the beginnings of the former we should logically look to the time and region of the latter's origin.

<sup>1</sup> Some of the English Calvinists appear to have borrowed it directly from the Anabaptists (see Burrage, 35, 42, 43); others probably indirectly, by way of Geneva.

## CHAPTER IV

### SWITZERLAND AND THE REFORMERS

FROM Germany the Anabaptist movement spread<sup>1</sup> to the one country of Europe where the folkmoot has maintained its pristine character and exercised the functions of a law-making body almost continuously until the present hour.

There is a record of a folkmoot, under the name of *Landsgemeinde*, held in the canton of Schwyz in 1294, within three years after the formation of the league which marks the beginning of the modern Switzerland.<sup>2</sup> And this was no solitary instance; the record discloses that the *Landsgemeinde* was then an established institution.<sup>3</sup> In Uri, matters relating to the pasturage had long been regulated by such an assemblage.<sup>4</sup> All through the intervening centuries the Swiss folkmoot, in one form or another, has continued. In some of the cantons it is still the sole legislative body;<sup>5</sup> in others representative legislatures have been constituted, but the principle of the folkmoot has been preserved even there. All proposed changes in either federal or cantonal constitutions must be submitted to the people, and in all save one of the cantons the referendum may be compelled.<sup>6</sup> Thus to-day, after having preserved this venerable institution through ages of political change and social upheaval, during which it has elsewhere mostly disappeared, the Alpine Republic is giving it new life and expanded scope, and offering it as a model to the statesmen of other lands.

<sup>1</sup> Burrage, "The Church Covenant Idea," 13.

<sup>2</sup> Blumer, "Staats und Rechtsgeschichte der Schweizerischen Demokratien," I, 135; Richman, "Appenzell," 145.

<sup>3</sup> Deploige, "The Referendum in Switzerland," 4, note.

<sup>4</sup> Id.

<sup>5</sup> Id., Introduction, xix. See Mr. Freeman's classical description of the *Landsgemeinde* in Uri and Appenzell, "Growth of the English Constitution," Chap. I. Cf. Richman, "Appenzell," Chap. VII; Adams and Cunningham, "The Swiss Confederation," 117 *et seq.*; Winchester, "The Swiss Republic," Chap. VII.

<sup>6</sup> Deploige, "The Referendum in Switzerland," Introduction, xvi.

Let us endeavor to ascertain how this remarkable preservation or revival was achieved.

### A. The Environment and the Background

In the Franco-Swiss frontier city of Geneva the folkmoot assumed the form of the *conseil général*, or primary assembly of the citizens, of which there are records reaching as far back as 1409.<sup>1</sup> This body "elected syndics and acted upon treaties."<sup>2</sup> In 1528 it signalized Genevese independence of Savoy by rejecting the *vidomne* (bishop's temporal deputy) nominated by the duke,<sup>3</sup> and in 1534 it took action denying the right of pardon claimed by the prince bishop himself.<sup>4</sup> A year later it was this *conseil général* which gave the final and effective approval to the measures by which the Catholic religion was formally deposed in Geneva,<sup>5</sup> and in 1536, upon the recommendation of the lesser council, which constituted the city's administrative body, this primary assembly met to consider the formal adoption of the Reformation. The record of this meeting is most instructive.

"By the voice of M. Claude Savoy," it recites, "were proposed the resolutions of the *conseil ordinaire* and of the Council of Two Hundred, touching the manner of living. . . . Whereupon, without any dissenting voice, it was generally voted, and with hands raised in air resolved and promised and sworn before God, that we all by the aid of God wish to live (*volons vivre*) in the holy evangelical law and Word of God, as it has been announced to us, desiring to abandon all masses, images, idols, and all that which may pertain thereto, to live in union and obedience to justice. . . . Also voted to try to secure (*mourrir et enseigner*) a competent man for the school, with sufficient salary to enable him to maintain and teach the poor free; and that every one be bound to send his children to the school and have them learn."<sup>6</sup>

Dr. Borgeaud, writing in 1890, predicted:—

"If ever the Registers of the Council of Geneva should be published, the amount of knowledge to be gained from a comparison between them and the Records of Massachusetts would be most striking."<sup>7</sup>

<sup>1</sup> Rivoire, "Registres du Conseil Genève" (Geneva, 1900), I, 2-6.

<sup>2</sup> Foster, "Geneva before Calvin," *American Historical Review*, VIII, 220.

<sup>3</sup> Roget, "Les Suisses et Genève ou l'Emancipation de la Communaute Genevoise au 16 Siècle" (1864), I, 298 et seq.

<sup>4</sup> Id. II, 76.

<sup>5</sup> Id. II, 191, quoting "Registres du Conseil," XXVIII, fol. 152, 153.

<sup>6</sup> "Registres du Conseil," XXIX, fol. 112, May 21, 1536. The translation is that of H. D. Foster, *American Historical Review*, VIII, 235.

<sup>7</sup> "The Rise of Modern Democracy in Old and New England" (London, 1894),

The "Registers" have at last been published, at least in part, and in the portion just quoted we have a remarkable fulfilment of this prediction. This account of the session of 1536 reads like the record of a New England town meeting of the succeeding century. There is the same submission of proposals to the entire body, the same voting by show of hands, the same religious cast to the proceedings, which we shall find to characterize the Puritan assemblies in the new world. Even the subjects of their deliberations are curiously identical. A Massachusetts town meeting of 1639 is declared to have established "the first school in the world supported by direct taxation."<sup>1</sup> But here was an assembly more than a century earlier, which provided not only for free public schools, but also for compulsory attendance!

Most significant of all, however, is the character of the institution itself. The Genevese, in the course of their civic evolution, had developed a system which approached closely to the machinery of modern constitution-making. While the lesser councils determined minor matters independently, important measures were finally passed on by the primary assembly of citizens. But these were formulated as proposals by one of the councils, which thus foreshadowed the modern convention in framing and submitting constitutions, just as the primary assembly, or *conseil général*, stands as the prototype of the modern electorate in passing upon, and giving validity to, the convention's work.

### B. Calvin

Three months after the historic meeting whose record we have just considered, there came to Geneva one who was destined to exert a profound influence upon the civil and religious development not alone of that community but also of Europe and even of America. John Calvin was then in his twenty-eighth year. Born in France and educated for the priesthood, he had been trained in the civil

153, note; first published in *Annales de l'École Libre des Sciences Politiques*, 1890-1891. Cf. Pattison, "Essays: Calvin at Geneva" II, 36: "What is above all wanted is the publication, in their integrity, of the Registers of the Councils and the Consistory."

<sup>1</sup> Joseph White, Massachusetts Superintendent of Publication Instruction, quoted by Mowry, "The First American Public School," *Education*, XXI, 537. The town meeting referred to was at Dorchester. See its Town Records, 54-56, 136, 137.

law,<sup>1</sup> and that fact had a most important bearing upon his work and influence. Shortly before coming to Geneva he had published the first edition of his "Institution of the Christian Religion,"<sup>2</sup> in which, as subsequently amplified, he set forth not only his theological system, but also his views on church polity and even of civil government.<sup>3</sup> The work is divided into four books, the fourth being entitled: "Of the manner or helps whereby God calleth us into the fellowship of Christ, and holdeth us in it," and is devoted largely to church government and administration. In the third chapter of this book the author treats "of the teachers and ministers of the church and of their election and office," and here occurs the following passage,<sup>4</sup> which well illustrates the basic theory of the Calvinistic system:—

"Now it is demanded whether the minister ought to be chosen of the whole church or only of the other of the same office, and of the elders that have rule of discipline, or whether he may be made by the authority of one man. They that give this authority to one man allege that which Paul saith to Titus, 'Therefore I have left thee in Crete that thou shouldst appoint in every town priests' (Titus i. 5). Again to Timothy, 'Lay not hands quickly upon any man' (1 Tim. v. 22). But they are deceived if they think that either Timothy at Ephesus or Titus in Crete held a kingly power that either of them should dispose all things at his own will. For they were above the rest only to go before the people with good and wholesome counsels; not that they only, excluding all others, should do what they listed. And that I may not seem to feign anything I will make it plain by a like example. For Luke rehearseth that Paul and Barnabas appointed priests in divers churches; but he also expresseth the order or manner how, when he says that it was done by voices ordaining priests (saith he) by lifting up of hands in every church. Therefore they two did create them; but the whole multitude as the Grecians' manner was in elections, did, by holding up their hands, declare, whom they would have. Even in like manner the Roman histories do sometimes say that the consul which kept the assemblies created new officers for none other cause but for that he received the voices and governed the people in the election. Truly it is not likely that Paul granted more to Timothy and Titus than he took

<sup>1</sup> His father was a notary in the ecclesiastical court of Noyon, Picardy, Calvin's native town, and the son was sent first to the University of Orleans "to study jurisprudence under Pierre de l'Etoile . . . reputed the acutest lawyer in France" and afterward "to complete his legal studies at the University of Bourges, the most renowned school in France for that branch of science, where it was taught by André Alciat, a famous Italian jurisconsult." — Dyer, "Life of Calvin" (London, 1850), 7-9.

<sup>2</sup> It "is dated at Basle in 1536, but no edition of that year is now extant. It is probable that the work first appeared in French; but the oldest edition known is a Latin one, bearing the date of 1536, probably a translation." — Id. 34.

<sup>3</sup> Chapter XX of the Fourth Book is entitled "Of Civile Government."

<sup>4</sup> Quotation is here made from the English translation of 1561 (London, Wolfe and Harison). The spelling is modernized.

to himself. But we see that he was wont to create bishops by voices of the people. Therefore the places above are to be understood that they diminished nothing of the common right and liberty of the church. Therefore Cyprian saith well when he affirmeth that it cometh from the authority of God that the priest should be chosen in [the] presence of the people, before the eyes of all men and should by public judgment and testimony be allowed for worthy and meet. For we see that this was, by the commandment of the Lord, observed in the Levitical priests that before their consecration they should be brought into the sight of the people. And no otherwise is Matthias added to the fellowship of the apostles; and no otherwise the seven deaconesses were created, but the people seeing and allowing it. These examples (saith Cyprian) do show that the ordering of a priest ought not to be done but in the knowledge of the people standing by, that the ordering may be just and lawful which hath been examined by the witness of all. We are therefore come thus far, that this is by the word of God a lawful calling of a minister, when they that seem meet are created *by the consent and allowance of the people.*"

The idea of the independence of the congregation was not new in Switzerland. It had been preached during the generation preceding Calvin by the Swiss reformer Zwingli,<sup>1</sup> who also appealed to the Bible as the sole source of authority.<sup>2</sup> But the doctrine of "common assent" — the idea that the individuals of the congregation must be consulted and their consent obtained in important matters of church government, such as the selection of officers, — though foreshadowed and applied in folkmoot and church covenant — appears to have been first clearly enunciated, in modern times, here in Calvin's "Institution."<sup>3</sup> It will be seen, too, that he not only lays down the doctrine but supports it by reasoning and precedent, appealing not alone to

<sup>1</sup> "The conception of the Congregation as the unit of ecclesiastical government seems to have been first definitely formulated as a system by Zwingle. 'Hong and Kussnacht is a truer church than all the bishops and popes together,' was the formal declaration of his ecclesiastical theory." — Doyle, "English Colonies in America" (New York, 1889), II, 7.

<sup>2</sup> Dyer, "Life of Calvin," 2.

<sup>3</sup> "What was really original in this work, was Calvin's doctrine of the organization of the Church and of its relation to the State. The base of the Christian republic was with him the Christian man, elected and called of God, preserved by his grace from the power of sin, predestinate to eternal life. Every such Christian man is in himself a priest, and every group of such men is a Church, self-governing, independent of all save God, supreme in its authority over all matters, ecclesiastical and spiritual. The constitution of such a church, where each member as a Christian was equal before God, necessarily took a democratic form. In Calvin's theory of Church government it is the Church which itself elects its lay elders and lay deacons for purposes of administration; it is with the approval and consent of the Church that elders and deacons with the existing body of pastors elect new ministers." — Green, "History of the English People" (New York, 1879), II, 279.

the Old and New Testaments, but also, as Rousseau did after him, to the democratic models of the classical nations. He might with propriety have appealed also to the institutions of his adopted country.<sup>1</sup> For what, after all, is his doctrine of common assent but the principle upon which the Swiss had been legislating and electing their magistrates for almost countless generations? upon which, indeed, the city state of Geneva was still to a great extent conducted?

But if Calvin failed to mention the popular assembly of Switzerland in his famous work, he did not fail to recognize and retain it in his politico-ecclesiastical system. For the author of the "Institution" did more than merely write a book or found a school of theology: he was a civil administrator as well. For nearly a quarter of a century he directed the affairs of state in Geneva, framed laws for the community, and utilized the institutions whose course of development we have already followed. Just as we shall find the English Puritans copying and preserving the forms and practices of the ancient guilds, so the Genevese reformer maintained and used the civic framework which had been built up before his time. "In the city of Calvin," says Borgeaud,<sup>2</sup> "the Small Council, the Council of Sixty, and the Council of Two Hundred ruled and made the laws; the General Council of citizens elected the magistrates *pro forma and approved the laws when made.*"

On the ecclesiastical side of the government, although the "Venerable Company" of ministers nominated the candidates for ordination and for vacant pastorates, yet these were subject to the approval of the lay members, who were given eight days to present objections.<sup>3</sup>

A striking illustration of the manner in which Calvin preserved the old Teutonic idea of the popular approval of laws is found in the adoption of the *Ordonnances Ecclésiastiques de l'Église de Genève*. On the day of his return from exile, in 1541, Calvin went before the Council and demanded the establishment of a disciplinary code. A

<sup>1</sup> The omission was doubtless due to his unfamiliarity with Swiss institutions when the work was first written.

<sup>2</sup> "Rise of Modern Democracy in Old and New England" (London, 1894), 153.

<sup>3</sup> Pattison, "Essays: Calvin at Geneva," II, 24. Cf. Borgeaud, "Rise of Modern Democracy" (London, 1894), 5.

"Despotic as the authority of pastor and elders seemed, pastor and elders were alike the creation of the whole congregation and their judgment could, in the last resort, be adopted or set aside by it." — Green, "History of the English People" (London, New York, 1879), II, 280.



committee was at once appointed to draft such an instrument, and the ideas of Calvin's "Institution" were accordingly reduced to the form of laws. The subsequent proceedings have been described as follows:—

"The regulations, some two hundred articles in all, were published, and for some weeks the people had the opportunity of considering them, and talking them over in their family circles. On November 20th, a solemn Council-General (*Conseil Général*) was convoked in St. Peter's Church. Each article was read and put to the vote separately. Before they quitted the church a whole people, between two and three thousand free and independent citizens, had voluntarily engaged to observe the whole circle of moral duties in this rigorous form: to attend divine service regularly, to bring up their children 'in the fear of the Lord,' to renounce not only sensual indulgences, but nearly every form of amusement, to adopt the severest simplicity in their dress, the strictest frugality and order in their abodes. Nor were these vain promises. The Ordinances were not only accepted; they were carried out in the letter and the spirit."<sup>1</sup>

These "*Ordinances*" have been called "an ecclesiastical constitution,"<sup>2</sup> but they were really much more, for they extend far into the field of what would now be considered secular legislation. In their substance they strongly and significantly resemble the church covenants and town compacts of Puritan New England; in mode of adoption they foreshadow the American constitutions. Every step in modern constitution-making—the framing, the submission, the publication and discussion, the ratification and observance—is carefully taken.

On the day following this act of popular approval, Calvin was appointed to prepare, in connection with three others, a code of secular law.<sup>3</sup> He seems to have devoted nearly a year to the task, and the effect of his legal training is apparent. The code is particularly distinguished for its minuteness in matters of police regulation and, after its adoption in 1543, it remained in force for a quarter of a century.<sup>4</sup>

The system of government maintained by Calvin was not, it is true, a pure democracy. It has even been called "an aristocracy tempered by the legal sovereignty of the community."<sup>5</sup> But, as has been elsewhere truly said, "aristocratic tendencies in Geneva

<sup>1</sup> Pattison, "Essays" (Oxford, 1889), II, 26, 27.

<sup>2</sup> *Id.* 22.

<sup>3</sup> "Registres du Conseil," 15 May, 1542.

<sup>4</sup> Dyer, "Life of Calvin" (London, 1850), 149, 150.

<sup>5</sup> Borgeaud, "Rise of Modern Democracy," 153-155.

appear, not with Calvin, but during the three generations preceding his arrival." <sup>1</sup> Whatever autocratic features appear in his administration, and these were not few, were more than offset by the democratic ideas which he formulated and, perhaps unconsciously, instilled. It is no paradox, much as it may seem so, that the Calvinists of Geneva have just erected an expiatory monument <sup>2</sup> to Servetus on the spot where that unfortunate radical was burned at the stake, by command of the reformer, three and a half centuries ago, nor that the Genevese, only last year, effected through their referendum a complete separation of church and state.

Scarcely less significant is the erection at Geneva, under the auspices of an international committee, of a monument to commemorate the approaching four hundredth anniversary of the reformer's birth. <sup>3</sup> All peoples, and particularly the Anglo-American, have been affected by the political ideas to which, consciously or not, he gave currency.

"That commanding figure, of such vast power," says Morley, <sup>4</sup> "yet somehow with so little lustre, by his unbending will, his pride, his severity, his French spirit of system, his gift for government, for legislation, for dialectic in every field, his incomparable industry and persistence, had conquered a more than pontifical ascendancy in the Protestant world. He meets us in England, as in Scotland, Holland, France, Switzerland, and the rising England across the Atlantic."

And one, even more authoritative, quotes, with apparent approval, the statement that, "the American government and constitution are based on the theology of Calvin and the philosophy of Hobbes." <sup>5</sup>

### C. The Refugees

Had Geneva remained isolated, or had Calvin's work been merely local in scope, the influence of the Genevan theocracy might have

<sup>1</sup> Foster, "Geneva before Calvin," *American Historical Review*, VIII, 221.

<sup>2</sup> See *The Nation*, LXXVII, 322. "The placing of this granite block," it is there observed, "is the outcome of the agitation of Professor Doumergue, the great historian of Calvin. Beneath the record of the historic event the tablet contains the following remarkable words: 'Fils respectueux et reconnaissants de Calvin, notre grand réformateur, mais condamnant une erreur qui fut celle de son siècle, et fermement attaches a la liberté de conscience selon les vrais principes de la Reformation, nous avons élevé ce monument Expiatoire le 27 Octobre, 1903.'"

<sup>3</sup> *The Nation*, LXXXIII, 460.

<sup>4</sup> "Oliver Cromwell," 47.

<sup>5</sup> Bryce, "The American Commonwealth" (Am. Ed., 1890), I, 299.

been temporary and unimportant. But the Calvinistic movement made this little town of twelve thousand inhabitants "the centre of the Protestant world."<sup>1</sup> From all over western Europe came adherents of the new faith,<sup>2</sup> who found in Geneva a haven of refuge from religious persecution. Here they were not merely imbued with Calvin's theological doctrines — they saw his politico-ecclesiastical system in actual operation — his plan of church government in which all members were equal and all officers derived their authority from the consent of the congregation — his theocratic state, modelled upon the church, in which the ideas of the old Teutonic folkmoot were reproduced, and all laws rested, at least theoretically, on the approval of the citizens. Those who came by 1536 were privileged to witness the inspiring spectacle of the people determining the state's policy and attitude toward the Reformation. Those who were there in 1541 beheld a similar scene when the citizens gave their assent to the "*Ordinances*." Object lessons like these could hardly fail to impress the foreigner.

Among those who found temporary homes at Geneva during the latter half of the sixteenth century were three men who, more than any others, influenced the course of the Reformation in Great Britain, and ultimately the trend of religious thought in America. John Knox, pioneer reformer of Scotland, came to Geneva in 1555 and remained there, barring some temporary absences, until 1559. He was the friend and associate of Calvin, and it was at the latter's request that the Lesser Council of the city provided quarters for the use of the English congregation of which Knox was pastor. The place which Geneva held in the affections and beliefs of Knox is shown by his declaration that "it is the most perfect school of Christ that ever was in earth since the days of the apostles."<sup>3</sup>

<sup>1</sup> Green, "History of the English People" (New York, 1879), II, 280.

<sup>2</sup> "It was part of Calvin's policy to admit strangers to the freedom of the city unrestrictedly. Towards his later years we find (1558) as many as three hundred incorporated in a single day, of whom two hundred were French, fifty English, twenty-five Italians, and five Spaniards. But even in 1536 they were numerous enough to excite the jealousy of the native patriots." — Pattison, "Essays" (Oxford, 1889), II, 17.

"In the one year, 1553, more than eight hundred went to the continent. Among these there were leaders of thought; for this number included five bishops, five deans, four archdeacons, and fifty doctors of divinity and famous preachers." — Mowry, "The Influence of John Calvin on the New England Town Meeting," *New England Magazine*, II, 105.

<sup>3</sup> Taylor, "John Knox" (New York, 1885), 105.

Ten years after the departure of Knox came one upon whom his mantle was ultimately to fall, — Andrew Melville. Calvin was now no more, but Beza, who had succeeded, received Melville and made him a teacher of the humanities in the college (*schola privata*) where he remained five years.<sup>1</sup> He had commenced the study of civil law at Poitiers and he continued it at Geneva, aided by intimate association with several Frenchmen “deeply learned in civil law and political science,” whom the persecutions culminating in the massacre of St. Bartholomew had driven to the Swiss town.<sup>2</sup>

Shortly after Melville had become thus established, another came whose influence upon the religious and political ideas of the future was even more extensive. Thomas Cartwright had been a professor of divinity at Cambridge, but, like Calvin and Melville, his tastes led him also into the field of law, and during Queen Mary’s reign he actually followed the legal profession.<sup>3</sup> Deposed from his professorship during Elizabeth’s reign, he left England and came eventually to Geneva, where the archives record some interesting events in his career. The first reference to him is as follows:—

“*English minister.* The ministers announced that there was an Englishman, an excellent theologian, whom they had asked to give some lectures on theology, on Thursday and Friday, which he had promised to do gratuitously, if agreeable to the gentlemen who have the approval thereof.”<sup>4</sup>

This “excellent theologian” was Cartwright, and the scene of his labors was the famous academy founded by Calvin a dozen years before.

We next hear of Cartwright from the “Venerable Company,”<sup>5</sup> whose record is as follows:—

“1572. Friday, Jan. 18. All the brothers being assembled, letters from England written by M. Chevalier, were read, recalling M. Thomas Cartwright. Thursday 25 (24) M. Beza proposed to the Consistory, if it found favor, that M. Cartwright and M. Van Til (pastor of the Flemish congregation at Geneva) should be present at some of our consistories, as they desire to observe the order

<sup>1</sup> See *American Historical Review*, V, 286, where some new facts in Melville’s Geneva career are brought to light.

<sup>2</sup> “*Encyclopædia Britannica*” (9th Ed.), XV, 852.

<sup>3</sup> *Id.* V, 145.

<sup>4</sup> “Register of the Council,” June 28, 1571; *American Historical Review*, V, 285.

<sup>5</sup> This was a board composed of pastors and teachers of theology which “superintended the theological students, selected the ministers for ordination, subject to the approbation of the flock, and had the ordinary administration of the church.” — Pattison, “*Essays*” (Oxford, 1889), II, 24.

## THE PEOPLE'S LAW

owed and to profit by and make use of it not alone for the government churches, but also to answer those who speak ill of our consistory. The was favored and it was agreed that the gentlemen should be asked to it for the next consistory.

day the 26 (25) M. Cartwright was invited to our Company and was for the trouble which he had taken for this school which we wish to to the extent of our power, both generally and in particular, recommend-church to his prayers as also to those of our English brethren to whom ping, whom we gladly saw here, when in exile, and love. Also we desire ed friendship to be well preserved and on our part we shall always be tender them service.

Cartwright on his part thanked the brethren very heartily for the honor had received, especially from them and also for the kindness and good n him generally in this city, and offered to do anything in his power church to which he felt under perpetual obligations. The brethren in- and his countrymen who were in the city to dine with them at the rec- quet next Tuesday at M. Charles Perrot's house."<sup>1</sup>

proposal so important as this — that a stranger should be d to the sessions of the Consistory — was not, however, to oted hastily. It comes now before the council:—

omas Cartwright, Englishman, doctor of theology, having lived here e because he was not in favor in England, because he had, in public defended the ecclesiastical discipline as here practiced, appeared and

the Company united. It was a main point with Calvin that the lay element in this body should outnumber the ecclesiastical. For the control given to this Consistory over the morals and deportment of the citizens was so searching and domestic, that to be at all tolerable, it should be lodged in the hands of the congregation itself; exercised by the people themselves upon themselves. To the Consistory belonged an absolute and irresponsible authority of censure, enforced by the power of excommunication, which the civil arm was obliged to give effect to. From his cradle to his grave the Genevese citizen was pursued by this inquisitorial eye. Those parts of life which are most private and withdrawn were here exposed to public view, and made an affair of public concernment and welfare."<sup>1</sup>

Thus on the eve of his departure for England, where he was to lay the foundations of the Puritan polity, Thomas Cartwright was awarded the rare privilege of beholding the inner workings of this governing body of the Calvinistic theocracy. Well has it been declared that we have here "substantial and striking proof of the Genevan origin of the ecclesiastical system of the Puritans."<sup>2</sup>

There have been other instances of Swiss influence upon our institutions not connected with the Calvinistic movement, but forming an instructive sequel. Two centuries after Calvin came Rousseau, who wrote, evidently, with the constitution of his native city of Geneva before his mind. His "Contrat Social," with its bold insistence upon the necessity of popular assent to laws, was widely read in America at the outbreak of the Revolution.<sup>3</sup> And besides fostering that movement it may well have stimulated the tendency in the New England colonies toward the submission of constitutions to a popular vote. In our own day, the university of this same city of Geneva — successor of Calvin's Academy — has sent forth a genius whose trinity of works on democratic institutions,<sup>4</sup> more than those of any other writer, has enabled us to rediscover the half-forgotten sources of our institutional life and has taught us our indebtedness to the movements of the sixteenth century. It is he, also, who has shown us<sup>5</sup> how Swiss influence on America has reacted and how the idea

<sup>1</sup> Pattison, "Essays" (Oxford, 1889), II, 25.

<sup>2</sup> *American Historical Review*, V, 285.

<sup>3</sup> Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 2; Reich, "A New View of the War of American Independence," *North American Review*, CLXXVII, 41.

<sup>4</sup> "Histoire du Plebiscite dans l'Antiquité" (Paris, 1887); "Rise of Modern Democracy in Old and New England" (London, 1894); "Adoption and Amendment of Constitutions" (New York and London, 1895).

<sup>5</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York and London, 1895), 257-262.

of popular ratification, first applied to constitutions in New England, was transplanted to France and thence to Switzerland, where though in vogue as to ordinary laws, it had never been employed in constitution-making. Calvin, Rousseau, Borgeaud — trio of Genevese of different epochs — how utterly unlike in personal traits, how divergent in their systems of political philosophy, and yet how harmonious in their teaching that laws — fundamental laws — must derive their validity from the assent of the people! No other city of Europe has produced a group whose utterances have so converged to this end and so strongly influenced the course of our development.

As a nation we are now experiencing another phase of Swiss influence — the study and discussion of the referendum with a view to its possible adoption in America. Whatever may be the result of this movement, it should at least emphasize the value of our own system of popular ratification whose history is hardly less ancient than the Swiss institution, whose development has been parallel, and whose roots reach downward into the same soil.

## CHAPTER V

### THE CALVINISTS IN GREAT BRITAIN

#### *A. The Doctrine of Congregational Assent and the Idea of the Covenant*

THE British refugees were not slow in applying the lessons learned at Geneva. Calvin's "Institution" has been characterized as "the chief religious and political text-book of the English Puritans,"<sup>1</sup> and the doctrine of the necessity of congregational assent, enunciated in that work, was soon transplanted to Great Britain.

Cartwright returned to England in 1572 fresh from the scenes witnessed at the long-sought meeting of the Genevan Consistory, and in the same year he launched a treatise which brought to English readers the ideas of the Franco-Swiss reformer, and sounded the keynote of English Puritanism. The fundamental idea of this work was its contention that all important measures of church administration, like the expulsion or admission of members or clergy, "required the assent of the whole congregation."<sup>2</sup>

Melville returned to Scotland two years later and became the organizer of the Presbyterian church and the principal author of the "Second Book of Discipline," which provided that "no person be intruded to any of the offices of the Kirk contrary to the will of the congregation to whom they are appointed."<sup>3</sup>

Soon the idea began to be applied to civil affairs. Robert Brown, who was at one time a student of Cartwright's at Cambridge, put forth a work in which he declared that "civill magistrates are persons

<sup>1</sup> Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, Pt. I, 3, American Colonies in the Seventeenth Century, I, 201.

<sup>2</sup> "Admonition to the Parliament" (2d Ed., 1617), 59.

<sup>3</sup> Burton, "History of Scotland" (Edinburgh and London), V, 202-204.

"The Second Book is, in fact, a revision of the Huguenot discipline adopted at the first national synod of the Reformed Church of France held at Paris in 1559. It is much shorter than the French document, yet far more complete; and any one comparing the two will find that they bear to each other the relation of a rough draft, which has been completed and polished by able hands." — Id. 202, 203.



authorized of God, and receyved by the consent and choyse of the people, whether officers or subjectes." <sup>1</sup> Here, too, we find the source of the notions rife in New England in the following century, such as were expressed in Hooker's famous Hartford sermon in which he lays down the proposition that "the choice of public magistrates belongs unto the people by God's own allowance," <sup>2</sup> and in Mather's work, supposed to have been written to the Salem church, declaring that "in a free state no magistrate hath power over the bodies, goods, lands, liberties of a free people, but by their free consent." <sup>3</sup>

Coupled with this doctrine the Anabaptist notion of the covenant reappears among the British Calvinists, often under the name of "association." The idea gained ground that religious (and ultimately political) movements and enterprises ought to be organized, and that such organization should be evidenced by a written bond of union, generally styled a covenant, which should formulate and embody fundamental matters and doctrines, and that the "common consent" of those who were concerned therein should be expressed by subscribing such an instrument. It was an idea which the Scotch especially seized upon and developed; for of all the peoples who embraced the Reformation, they took the movement most seriously and applied its fundamental doctrines most literally. From Calvin they learned to look to the Bible as the supreme authority in all matters, and their political ideas, no less than their religious dogmas, were drawn largely therefrom. "In various Old Testament passages," observes Bayne, <sup>4</sup> "the Hebrews are described as entering into covenant with God. In these the Scots found a warrant for adopting a similar course. Time could not invalidate, or circumstances modify, the validity of such a covenant."

But the Scots were not alone in the possession of this idea. Brown, the English Congregationalist, in his book <sup>5</sup> defined the church substantially as a company of believers united "by a willing covenant."

<sup>1</sup> "A Book Which Showeth the Life and Manners of All True Christians" (Middeltburg, 1582; British Museum, sec. 37, c. 57).

<sup>2</sup> "Collections of Connecticut Historical Society," I, 20.

<sup>3</sup> "Model of Church and Civil Power." See Roger Williams' "Bloody Tenent of Persecution" (London, 1644). The portion quoted in the text is afterward qualified by a concession of the plenary power of magistrates.

<sup>4</sup> "The Chief Actors in the Puritan Revolution" (2d Ed., London, 1879), 215.

<sup>5</sup> "A Book Which Showeth the Life and Manners of All True Christians," Definitions, I, 35. See also Dexter, "The Congregationalism of the Last Three Hundred Years" (New York, 1880), 106.

"The Puritans," observes Briggs,<sup>1</sup> "wrought out the doctrine of the covenant. They understood it as the structural principle of their theology." In a subsequent chapter<sup>2</sup> we shall follow the parallel development and application of this idea in the civil affairs of Scotland and England.

### *B. Connection between Calvinism and the Guilds*

It is clear that in Calvinism, as taught and practised at Geneva, we have the primary source of the Puritan creed. But will this alone account for the political contributions of Puritanism and particularly for its achievement in preserving and bequeathing to the modern world the practice of the popular approval of laws? If so, how shall we explain the sterility as regards these results of the sects of other nationalities which learned their creeds at Geneva? For the British refugees were not the only ones who flocked to the "city of Calvin"; they were not even the most numerous. They were far outnumbered by the French, and there were also Dutch, Italian, and even Spanish.<sup>3</sup> Yet none of these introduced, as we shall find the British<sup>4</sup> did, the idea of popular legislation into their respective states.

It is evident that this political service of the British Calvinists was due to something more than creed — important as the latter was in affording the original inspiration. There must have been some racial element — something peculiar to these Britons — which made them so much more fruitful in constitutional results than the other branches of Calvinists. Strong evidence exists that this element was supplied by those institutions, distinctively British in their political influence, whose place in the line of constitutional development has already been briefly considered,<sup>5</sup> viz. the guilds.

The Calvinists appeared on the scene just as the guilds were declining as a factor in the social and civic life of England, but after these had succeeded in keeping the English people familiar with the idea of making their own local regulations. This coincidence in

<sup>1</sup> "American Presbyterianism" (New York, 1885), 54.

<sup>2</sup> Chap. VI, *post*.

<sup>3</sup> Pattison, "Essays: Calvin at Geneva," II, 17. Cf. Green, "History of the English People" (New York, 1879), II, 280, 281.

<sup>4</sup> The term "British" is intended to include the Lowland Scotch, who were partly of Anglo-Saxon blood and from whom mainly came the Covenanters. Hanna, "The Scotch-Irish" (New York, 1902), I, Chap. XIII.

<sup>5</sup> *Ante*, Chap. II.

point of time is not the sole or the strongest fact suggesting a connection between the two and a direct influence of the former upon the latter. We may note also:—

1. *Local Contact and Environment.*

The town of Norwich has been called "the cradle of Congregationalism."<sup>1</sup> It was fertile soil for a new religious movement, for it had been one of the strongholds of the Lollards as well as of the early Protestant reformers in Elizabeth's reign.<sup>2</sup> To Norwich about 1580 came Robert Brown.<sup>3</sup> He had, as we have seen, been a student under Thomas Cartwright at Cambridge, but had advanced beyond the position of his teacher and started a movement of his own.<sup>4</sup> At Norwich, after preaching at private houses and carrying on personal work with individuals, he organized a church or "company of believers." Through the opposition of the Bishop he was finally compelled to leave, and took most of his flock to Middelburg, Zealand, though the church at Norwich continued to exist. Brown has been styled<sup>5</sup> "the founder of Congregationalism."

"Men suppose," says Dexter,<sup>6</sup> "that rude galleons were blown across the great and wide sea to our western continent centuries before that famous expedition of 1492; but as they never went back to carry the tidings it is usual to say that Christopher Columbus discovered America. And I submit that the name of Robert Brown, and not the name of Richard Fitz, stands legitimately first in the list of our distinguished politists; and that the true ter-centenary of English Congregationalism remains properly to be celebrated in 1880 at Norwich. . . . The Independents of England and the Congregationalists of America, more nearly than from any other, are to-day in lineal descent from that little Norwich church."

It was near Norwich, also, that John Robinson was stationed while still a clergyman of the Established Church, and it was from

<sup>1</sup> Borgeaud, "Rise of Modern Democracy in Old and New England" (London, 1894), 87, note.

<sup>2</sup> "Encyclopædia Britannica" (9th Ed.), XVII, 595.

<sup>3</sup> Brown was born at Tolethorpe, Rutlandshire, *ca.* 1550, and was therefore about thirty years of age when he went to Norwich. An interesting account of his life and work is given by Dexter, "The Congregationalism of the Last Three Hundred Years" (New York, 1880), 61-128.

<sup>4</sup> Gooch, "History of English Democratic Ideas in the Seventeenth Century" (Cambridge, 1898), 49.

<sup>5</sup> Borgeaud, "Rise of Democracy in Old and New England" (London, 1894), 33.

<sup>6</sup> Dexter, "The Congregationalism of the Last Three Hundred Years" (New York, 1880), 61-128. Mr. Burrage takes a less favorable view of Brown, "who," he says, "could not be called a great leader, for he was rash and impulsive." — "The Church Covenant Idea," 34, 35.

here that he came, a quarter of a century after Brown, to become the pastor of the scattered flock at Scrooby, and later at Leyden, which was the nucleus of the colony of New Plymouth.<sup>1</sup>

Now Norwich and the county of Norfolk, of which it was the capital, had long been a prominent centre of activity in guild life.<sup>2</sup> Brentano<sup>3</sup> speaks of twelve of the religious or social guilds which existed at Norwich, and there seem to have been even more at Lynn in the same shire.<sup>4</sup> Nearly one-half the ordinances in Toulmin Smith's collection were enacted by the guilds of Norfolk — one-fourth of these by the Norwich guilds. Moreover, this was one of the towns where all freemen or citizens were required to be members of some guild.<sup>5</sup> A "composition entered into by the citizens" in 1414 provided: —

"& yt alle maner of men now citezeyns of ye Cite shal be enrolled of what craft yt he be wiin XII. months & i day, upon payne of forfaite of his fraunchise, payenge I. d for ye entre; & yt alle maner of men yt shal be fraunchised for ys tyme forth, shal be enrolled under a craft, & be assent of a craft, yt is for to seyne ye maisters and maistres of ye same craft yt he shal be enrolled of shal come to ye Chamber & witesse yt it is her wille yt he shude be made freman of her Craft, payenge to ye Chamber atte lieste XX s. & more after ye quantite of his goods, as he may accord wit ye Chamberleyne." <sup>6</sup>

In 1548, during the Protestant upheaval of the reign of Edward VI, the guilds are said to have been suppressed.<sup>7</sup> But this appears to have related mainly to their religious features, such as masses and prayers for the dead; "the crafts remained as societies, responsible for securing good work and possibly something more." <sup>8</sup>

<sup>1</sup> Goodwin, "The Pilgrim Republic" (Boston, 1888), 26.

<sup>2</sup> See an interesting paper entitled "Some Notes upon the Craft Guilds of Norwich" (with particular references to the Masons), by J. C. Tingey, *Ars Quatuor Coronatorum* (London, 1902), XV, 197; also in the same volume at p. 205, "Extracts from the Records of the Corporation of Norwich," by Walter Rye. These contributions abound in evidence of the important part played by the craft guilds in the civic life of Norwich.

<sup>3</sup> "History and Development of Gilds" (London, 1870), 18. Cf. Walford, "Guilds" (London, 1888), Chap. 36.

<sup>4</sup> Walford, "Guilds" (London, 1888), Chap. 34.

<sup>5</sup> Blomefield, "History of Norfolk" (Norwich, 1745), III, 131; Gross, "The Gild Merchant" (Oxford, 1890), I, 124, note.

<sup>6</sup> Gross, "The Gild Merchant" (Oxford, 1890), II, 189, 190.

<sup>7</sup> Tingey, "Some Notes upon the Craft Guilds of Norwich," *Ars Quatuor Coronatorum*, XV, 200, 201.

<sup>8</sup> Id. 201.

During Elizabeth's reign, by-laws for the Norwich crafts continued to be issued,<sup>1</sup> those for the "Fellowship and company of Masons"<sup>2</sup> appearing in 1572, only eight years before Brown's arrival in the city. A similar set of by-laws appears in the reign of James I, and wardens for the crafts were appointed at Norwich down to the middle of the eighteenth century.<sup>3</sup>

It was in this atmosphere, permeated with the spirit of guild life and infused with the democratic ideas which it fostered, surrounded by these venerable institutions which had formed almost the only school of the English people in self-government during the Middle Ages, that Brown founded his church. He and his followers could hardly have escaped, if they would, the effect of this environment, or failed to be influenced by the traditions, customs, and practices of the guilds. If any of them had been numbered among the refugees at Geneva, how strongly must they have been reminded by guild legislation of the methods by which the "*Ordnances Ecclésiastiques*"<sup>4</sup> were adopted. Even the name was common and the two precedents necessarily strengthened each other. In Brown's own case also there was the influence of heredity and family tradition, for one of his ancestors was a "merchant of the staple" — a member of an ancient company or guild of merchants which exported the staple wares.<sup>5</sup>

A keen observer<sup>6</sup> in this field has said:—

<sup>1</sup> Tingey, "Some Notes upon the Craft Guilds of Norwich," *Ars Quatuor Coronatorum*, XV, 201.

<sup>2</sup> An interesting and natural result was that Norwich continued to be a seat of this particular craft, which alone survives of all the guilds, though transformed into the modern fraternity of Freemasons. A lodge existed at Norwich, shortly after the transition from operative to speculative masonry had been accomplished. See Le Strange, "History of Freemasonry in Norfolk"; cf. *Ars Quatuor Coronatorum*, XV, 175. And it is still an important centre for the fraternity. See an account of the 1902 summer excursion to Norwich of Quatuor Coronati Lodge, No. 2076, London, *Ars Quatuor Coronatorum*, XV, 141. Even more significant is the fact that the Masonic order in some jurisdictions has retained the ancient guild plan of requiring "common assent" to craft regulations, and has even improved that plan so that it approaches closely to the methods of modern constitution-making. Proposed changes in the constitution of the fraternity in a given jurisdiction are framed in the Grand Lodge, and by it submitted to the subordinate lodge where the individual members vote to accept or reject. See Law of Freemasonry in Nebraska, 1904.

<sup>3</sup> *Ars Quatuor Coronatorum*, XV, 202.

<sup>4</sup> See *ante*, 31, 32.

<sup>5</sup> Dexter, "The Congregationalism of the Last Three Hundred Years" (New York, 1880), 63, note 7.

<sup>6</sup> Borgeaud, "Rise of Democracy in Old and New England" (London, 1894), 86, 87.

"The example of the boroughs or municipal corporations, and of the corporations of merchants and artisans, is often quoted in the pamphlets of the early period of Congregationalism. It is well known that both these were the outcome of the Guilds of the Middle Ages, whose internal organization they had borrowed. It is extremely probable<sup>1</sup> that, though the Bible supplied the Separatists with the original idea of their Church covenant, the form which that covenant actually took in their first congregations was not uninfluenced by their knowledge of the statutes established by the founders of these Guilds, and by the custom which then prevailed of requiring new members to give their adhesion to the statutes by an individual vote. So striking are the analogies, that it even seems probable that Brown, when he was organizing his Church at Norwich, had before him, side by side with his Bible, the statute of one of these pious corporations, once so numerous and influential in the county of Norfolk."

One of the institutions which still survived at Norwich in Brown's time was the Guild of St. George, which

"was a very influential body. The mayor of the city on leaving office became alderman of this fraternity for the ensuing year. If the alderman of the guild died, the mayor took his place. A person expelled from the brotherhood lost his citizenship."<sup>2</sup>

This particular guild seems to have been quite familiar to the "founder of Congregationalism."

"The very name of Company, which was borne by this corporation after the Reformation, was that under which his Church of 'true Christians' presented itself to Brown. It was the only one which the law would at this time sanction."<sup>3</sup>

## 2. *The Pilgrim Companies*

External evidence of the connection between Puritanism and the guilds is also to be found in the character of the companies formed among the Pilgrims for emigration to America. The guilds in the course of their evolution had given rise to companies known as the "Merchant Adventurers,"<sup>4</sup> which were "intended to give protection to Englishmen trading abroad."<sup>5</sup> The principal ones are thus described by Gross:<sup>6</sup>—

<sup>1</sup> But much more probable that they acquired it from the Anabaptists. "The Brownists did borrow all their Tenets from the Anabaptists of old." — Baillie, "Anabaptism and Independency," etc., 49. See other similar statements quoted by Burrage, "The Church Covenant Idea," 42, 43. Cf. Chap. III, *ante*.

<sup>2</sup> Gross, "The Gild Merchant" (Oxford, 1890), I, 84, note.

<sup>3</sup> Borgeaud, "Rise of Democracy in Old and New England" (London, 1894), 87.

<sup>4</sup> Gross, "The Gild Merchant" (Oxford, 1890), I, Chap. VIII, sec. 3. "The trading company was an offshoot of the guilds." — Brooks Adams, "The Embryo of a Commonwealth," *Atlantic Monthly*, LIV, 612.

<sup>5</sup> *Atlantic Monthly*, LIV, 612.

<sup>6</sup> "The Gild Merchant" (Oxford, 1890), I, 156.

"Besides the Company of Merchant Adventurers trading to the low Countries— which during the eighteenth century was called the Hamburgh Company— various new Companies of Merchant Adventurers trading to other lands arose in the sixteenth and seventeenth centuries, especially during the reigns of Elizabeth and her immediate successors. Among them were the Russians or Muscovy Company, the Turkey or Levant Company, the Guinea Company, the Morocco Company, the East-Land Company, the Spanish Company, and the East India Company, the last-mentioned being the most powerful of them all."

Now the Puritan emigrant companies were organized on the model of these "Merchant Adventurers."

"The company of Massachusetts Bay," observes Mr. Brooks Adams,<sup>1</sup> "was organized in the form of a trading corporation, just as the Merchant Adventurers, the Turkey, or the East India Company had been organized. This as a legal proposition does not seem to be open to dispute. At the same time, nothing can be more certain than that the enthusiasts who settled at Boston came to America with no idea of gain. They came here on the contrary, abandoning all worldly advantages, to found a religious republic, in a land so far from England that they thought themselves unlikely to be disturbed. Nevertheless, the form in which the British government gave its sanction to their emigration was as an association of Englishmen going to a foreign country for the purpose of trade, and taking with them the authority necessary to enforce order among themselves, just as the Merchant Adventurers had done centuries before in Flanders, and as the East India Company was then doing in Hindostan.

"Nobody can doubt this fact who will make a very slight examination of the old charters, which vary from one another only in details, and are evidently drawn up upon the same model."

The "King's Docket" or memorandum of the Massachusetts Bay Company's charter, granted in 1628, recited that it was

"Incorporating them also by the name of the Governor and Company of Massachusetts Bay in New England in America, with such other clauses for ye electing of Governors and Officers here in England for ye said Company, and powers to make laws and ordinances for settling ye government and magistracy for ye plantation there, and with such exemptions from Customs and Impositions and some (such?) other privileges as were originally granted to the Councill aforesaid and are usually allowed to Corporacons in England."<sup>2</sup>

<sup>1</sup> "The Embryo of a Commonwealth," *Atlantic Monthly*, LIV, 613. Borgeaud says: "A corporation of twenty-six persons, possessing the character both of a trading Company and of a religious Guild,— it announced that beyond its commercial object it had a religious aim, the propagation of the gospel— had obtained from Charles I a promise that he would confirm those rights of property, which it had obtained by contract from the Plymouth Company, on a portion of the New England territory." — "Rise of Democracy in Old and New England" (London, 1894), 142.

<sup>2</sup> See *Atlantic Monthly*, LIV, 613.

The Mayflower company had also been organized on this plan.

"The church at Leyden," says Osgood,<sup>1</sup> "when it opened negotiations with the Virginia company respecting a place of settlement, added to its religious functions the character of a business corporation. It sent agents to England to represent its interests there. Robinson himself was commissioned by it to negotiate with the Dutch West India company. The reports of these agents were received and acted on by the church, — the same body, organized in the same way, as that which met for worship on the Sabbath. When they had resolved to migrate to New England, this congregation formed a joint stock company with the merchant adventurers at London."

Borgeaud speaks of "the old guilds to which the company of the Pilgrim fathers may be compared from a legal point of view."<sup>2</sup> Like the guilds these companies had a sort of legal solidarity, a spirit of mutual helpfulness among their members, and, what interests us most, all had a voice in the making of their laws and regulations.

There was also at least one instance where one of these Pilgrim companies, after migrating, consciously followed the example of the guilds. The New Haven colony, as we shall hereafter find, included a number of London merchants, and when the colonists were deliberating, after they had reached their new home, on their form of government, and objection was made to delegating their powers to magistrates,

"Mr. Theophilus Eaton answered thatt in all places they chuse committyes, in like manner the companyes of London chuse the liueryes by whom the publique magistrates are chosen. In this the rest are not wronged because they expect in time to be of ye liury themselues, and to haue the same power."<sup>3</sup>

On the same occasion they adopted a "fundamental agreement" which was effected by the "common assent" of all the members, while they provided that it should be signed by others who should be admitted into the colony thereafter.<sup>4</sup> Both of these were ideas and practices of the guilds.

Thus much of the external organization of these ancient institutions and their successors was carried forward to those companies by which Puritanism was transplanted to the New World. We shall find as we proceed evidence that something of the internal spirit and workings of the guilds was likewise absorbed by the Puritans.

<sup>1</sup> "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, Pt. I, 16.

<sup>2</sup> "Rise of Democracy in Old and New England" (London, 1894), 113.

<sup>3</sup> "New Haven Colonial Records" (Hartford, 1857), 14.

<sup>4</sup> *Id.* 17.



Such were the influences that produced the politico-ecclesiastical system of the Calvinists; the Reformation, absorbing the results of civic evolution and reviving the embers of ancient democratic institutions in Switzerland — the Guilds, Palladium of British democracy. Which of these was the most potential we need not here consider, for all find a common meeting point in the doctrine that the people are the ultimate source of law. Of this doctrine Calvinism was not only the heir but the transmitter, for it is by no exaggerated figure that the old Puritan stock is termed the "depository of the sacred fire of liberty."<sup>1</sup>

<sup>1</sup> Kingston, "East Anglia in the Great Civil War" (London, 1897), 3.

## CHAPTER VI

### POPULAR RATIFICATION IN THE PUBLIC LAW OF THE BRITISH ISLES

#### *A. The Scottish Covenants*<sup>1</sup>

WE have noticed how attractive the idea of the covenant was to Calvinists of Scotland. As between that country and England it was only natural that the idea should be applied earlier to the public law of the northern kingdom. The first appearance in Scotland of Protestantism "as a public power in the state" was preceded by the adoption of a covenant. In 1557 certain of the landed gentry who were friendly to the new religion gathered at Edinburgh and signed what is known in history as the First Covenant.<sup>2</sup> By it they agreed "to maintain, set forward and establish the most blessed Word of God and His Congregation . . . forsake and renounce the Congregation of Satan with all the superstitious abomination and idolatry thereof . . . by this our faithful promise before God, testified to His Congregation, by our subscriptions at these presents."

When, about a quarter of a century later, the General Assembly completed the reconstruction of the Scottish Kirk according to the Presbyterian system by adopting what was in reality a new ecclesiastical constitution, but which is known as the "Second Book of Discipline,"<sup>3</sup> copies of the "Book" were sent to the different presbyteries into which the church had been divided, somewhat in the manner of submitting a constitution. Shortly afterward, in 1581, the Assembly, suspicious concerning the court's adherence to the cause of the reformers, presented for its acceptance another covenant<sup>4</sup> reciting the essential doctrines of Protestantism, and that "we shall continue in the obedience of the doctrine and discipline of this

<sup>1</sup> Besides those discussed in this chapter several other Scottish "Bunds" or covenants, mostly of a local character, are mentioned by Dr. James Kerr, "The Covenants and the Covenanters" (Edinburgh, 1895), 12 *et seq.*

<sup>2</sup> It is printed in full in Burton, "History of Scotland" (Edinburgh), III, 345.

<sup>3</sup> *Id.* V, Chap. LVIII. See *ante*, 39.

<sup>4</sup> *Id.* V, 206 *et seq.*

Kirk, and shall defend the same, according to our vocation and power, all the days of our lives."

This covenant was signed by both the king and his courtiers, and then a step was taken which greatly extended the practice of covenant-making. For to that practice was added an application, limited though it may have been, of the Calvinistic doctrine of "common assent," which had already, as we have seen, found lodgement in the constitution of the Kirk. The new covenant<sup>1</sup> was to be signed not by the court alone but by a portion at least of the people, and orders were issued to the ministers to ask the signatures of their parishioners. Here we have, probably, the nearest approach, up to this time in Great Britain, to a consultation of the people. The signatures required were not, it is true, necessarily to be spontaneous. Those who refused to sign were to be dealt with "according to our laws and order of the Kirk."<sup>2</sup> But the precedent was established which would one day lead to a voluntary expression of the people's will.

The next covenant of importance in Scottish history was the outgrowth of the liturgical struggle under Charles I. In 1638, after the Presbyterians had lodged their famous "Protestation" against what they considered the "Romish tendencies" of Laud, the proposal was made to renew the covenant of a half century before. The suggestion of this plan is ascribed to Archibald Johnston, an eminent canonist, to whom, in conjunction with Sir Thomas Hope, the King's advocate, and Alexander Henderson, was committed the task of preparing the instrument. The two first named had been prominent in framing the "Protestation," and are characterized as "the two most distinguished lawyers of the time."<sup>3</sup>

"The renewal of the covenant," says Burton,<sup>4</sup> "was a master stroke of policy. The covenant had been drawn under a reign of terror. . . . In now renewing it, the Supplicants had all the advantage of its denunciatory rhetoric, while they stood free of all charge of malignant exaggeration."

But it is not so much the substance and phraseology of the covenant which interests us here as the manner of its establishment. For its promoters were not satisfied with its merely passive acceptance or

<sup>1</sup> Printed in full in Burton, "History of Scotland" (Edinburgh), V, 208.

<sup>2</sup> Elsewhere the same authority says that this covenant had "only been signed by a select group of influential people." (VI, 186).

<sup>3</sup> Brown, "History of Scotland" (Cambridge, 1902), II, 304.

<sup>4</sup> VI, 183.

with the signatures of a select portion of the people. They proposed to make it a truly *national* covenant, and their ambition was no less than "to attempt at least to draw to it the adherence of the adult male community of Scotland at large."<sup>1</sup> The first step was taken, naturally enough, at the capital, and the scene has been graphically described by a recent historian as follows:<sup>2</sup>—

"The 28th of February,<sup>3</sup> 1638, was the day chosen for the signing of the Covenant. By daybreak all of the commissioners were met. The Covenant was read over to them, and each proposition discussed and agreed to. The meeting for the signing of the Covenant had been appointed for the afternoon, and crowds of people soon gathered in the Greyfriars' Church and churchyard. From all parts of the kingdom some sixty thousand people assembled; and before the commissioners appeared the church and grounds were densely filled with multitudes of Scotland's bravest and wisest sons and daughters. When the hour of two approached, Rothes, Loudon, Henderson, Dickson and Johnstone entered, bearing a copy of the Covenant prepared for signatures. The Earl of Loudon then stood forth and spoke to the people. . . . He made an eloquent and patriotic address touching the preservation of their religion, their duty to God, and to their country. . . . After he had ceased speaking, Johnstone of Warriston unrolled the vast sheet of parchment and read the Covenant. Opportunity was then given for those who might have objections to offer to do so, but no objections were offered. An aged nobleman, the Earl of Sutherland, was the first to sign the bond, and then name followed name in quick succession until all within the church had affixed their signatures. The parchment was then carried out to the churchyard, and placed on a flat gravestone for additional signatures. Here the scene became still more impressive. The emotions of many became irrepressible. Some wept and cried aloud; some burst into a shout of exultation; some, after their names, added the words 'till death'; and some, opening a vein, subscribed with their own blood. As the space became filled, they wrote their names in a contracted form, limiting them at last to the initial letters, till not a spot remained on which another letter could be inscribed."

The submission to the country followed. Copies of the covenant containing the signatures already appended<sup>4</sup> were carried to the remote districts. There does not seem to have been any resort to,

<sup>1</sup> Burton, "History of Scotland," VI, 186. Brown (II, 304) adds that it was signed "with tumultuous enthusiasm" and "with such mutual content and joy as those who having long been outlaws and rebels are admitted again in covenant with God."

<sup>2</sup> Hanna, "The Scotch-Irish" (New York, 1902), I, 445.

<sup>3</sup> Brown says that the date was March 1. "History of Scotland," II, 304.

<sup>4</sup> "It is noticed that several existing copies of the Covenant of 1638 bear the same names. In fact, according to a practice well known in later times, the eminent adherents of the cause — those whose names were likely to catch others — signed several covenant sheets." — Burton, VI, 186, 187.

or occasion for, coercion in obtaining signatures.<sup>1</sup> How it was received in the country is best related in the language of a contemporary:<sup>2</sup>

"Gentlemen and noblemen carried copies about in their portmanteaus or pockets, requiring subscriptions thereunto, and using their utmost endeavours with their friends in private for to subscribe. It was subscribed publicly in churches, ministers exhorting their people thereunto. It was also subscribed and sworn privately. All had power to take the oath, and were licensed and welcome to come in; and any that pleased had power and licence for to carry the Covenant about with him, and give the oath to such as were willing to subscribe and swear. And such was the zeal of many subscribers, that for a while many subscribed with tears on their cheeks; and it is constantly reported that some did draw their own blood, and used it in place of ink to underwrite their names."

The National Covenant had, in fact, become the absorbing interest of the hour.

"By a large majority of the nobility," says Brown,<sup>3</sup> "by every town of note except Aberdeen, by the mass of the people of rank in all parts of the country, the Covenant was signed with an enthusiasm such as had never before swept over the Scottish people. Now, if ever, was realized Milton's vision of a nation 'rousing herself like a strong man after sleep, and shaking her invincible locks.'"

It was indeed the awakening of a people — the recovery of self-consciousness on the part of the masses and the realization that they were an integral part of the nation, entitled to be consulted upon its most momentous problems and sharing the glorious privilege of shaping its destiny.

That this enthusiasm for the National Covenant was not, however, merely the intoxication of newly acquired power but was the spontaneous expression of real devotion to the instrument itself and what it stood for, was demonstrated shortly afterward when the king sought to turn the tide in his own favor and divide the ranks of the "Covenanters," as they were henceforth called.<sup>4</sup> To do this

<sup>1</sup> "Some men of no small note offered their subscription, and were refused, till time should prove that they joined from love of the cause and not from the fear of man." — Henderson, quoted in Hanna, "The Scotch-Irish" (New York, 1902), I, 445.

<sup>2</sup> "A well educated country clergyman of the north who looked at the scene with divided interest." — Burton, VI, 187, citing Gordon's "Scots Affairs."

<sup>3</sup> "History of Scotland," 304, 305. "To many of the poor people of Scotland the 'Covenant' was a cause for which they were ready to suffer persecution, imprisonment, torture and death." — Bisset, "Omitted Chapters of the History of England" (London, 1864), I, 276. Cf. Hanna, "The Scotch-Irish," I, 445.

<sup>4</sup> "At this time the persons heretofore spoken of by contemporary writers as 'Supplicants' receive the far more renowned name of 'Covenanters.'" — Burton, VI, 188

he caused the preparation of a counter instrument which was to be styled the "King's Covenant," and which differed from the National Covenant mainly in its practical annulment of the latter. "For some time, therefore," observes Brown,<sup>1</sup> "the singular spectacle was seen of the two Covenants in rivalry for the suffrages of the people." But this new partner of the king's rule could not thus easily be swerved from its convictions or misled by stratagem. "Outside of Aberdeen his covenant received little support, and it only kept alive the suspicions which his tardy concessions might have done something to allay."<sup>2</sup>

Nevertheless, while this device of the king failed of its purpose, it is an important landmark in constitutional history. Just as the National Covenant is probably the first example of practically an entire nation subscribing to a written compact, so this counter movement started by the king is the earliest formal recognition by a sovereign of the importance — not to say necessity — of inviting the popular ratification of such a compact. The cause of democracy and the doctrine of the sovereignty of the people had made an enormous advance by means of these covenants in Scotland.

### *B. Church Covenants in England*

While the Scotch were engaged in subscribing their Second National Covenant, Robert Brown, as we have seen,<sup>3</sup> was organizing his church at Norwich. Brown himself describes the method of organization in one of his books,<sup>4</sup> where, speaking of his flock, he says, *inter alia*:—

"There was a day appointed & an order taken, for redresse off the former abuses, & for cleauing to the Lord in greater obediēce. so a covenāt was made & ther mutual cōsent was geuē to hould to gether.

"There were certaine chief pointes proued vnto them by the scriptures all which being particularlie rehersed vnto them with exhortation they agreed vpon them, & pronouced their agrement to ech thing particularlie, saing, to this we geue our consent. First therefore thei gaue their consent, to ioine themselues

<sup>1</sup> "History of Scotland," II, 306.

<sup>2</sup> *Id.*; Baillie, "Letters and Journals," I, 106, 107.

<sup>3</sup> *Ante*, 42.

<sup>4</sup> "A True and Short Declaration both of the Gathering and Joyning Together of Certain Persons; and also of the Lamentable Breach and Division which fell amongst them." — Quoted in Burrage, "The Church Covenant Idea," 46, 48.

to the Lord, in one couenant & fellowship together, & to keep & seek agrement vnder his lawes & government:"

Here we have, perhaps for the first time in England,<sup>1</sup> the doctrine of common assent expressed in concrete form and coupled with the idea of the covenant and both notions applied in a practical way. About a dozen years later a covenant appears in which the plan of subscription of the covenant by the church members is first made prominent. The initial paragraphs are as follows:—

"Francis Johnson his articles, wch he vrged to be vnder written by the English Marchants in Middleboroughe in October 1591. withstoode by me Thomas Ferrers, then Deputie of the Companie there.

"Wee whose names are vnderwritten, doe beleve and acknowledge the truthe of the Doctrine and faythe of our Lorde Jesus Christe, wch is revealed vnto vs in the Canon of the Scriptures of the olde and newe Testament." <sup>2</sup>

Francis Johnson was the pastor of the church of these "English Marchants in Middleboroughe," and in commenting on the "articles" he says:—

"That for anie wch haue bene of this *Churche* and will not vnder-write these wth promise (as God shall inhable them) to stande to the forme and everie poynte of them, againste men and Angells vnto the deathe; otherwise he may not be receaved as a member in this *Churche*." <sup>3</sup>

In other words, "common assent" must now be expressed by subscription to the covenant, and this becomes an essential step in attaining church membership.

From this time on the adoption of covenants by the English dissenting churches becomes common. One of uncertain date, but purporting to be of 1599 and to emanate from a church in Lincolnshire, repeats the subscription feature above mentioned.<sup>4</sup> In 1602 the church at Gainsborough, from whose bosom afterward came the Mayflower company, declared:—

"We, the Lord's free people, join ourselves by a covenant of the Lord, into a church estate in the fellowship of the Gospel, to walk in all his ways, made known or to be made known unto us, according to our best endeavors." <sup>5</sup>

<sup>1</sup> Burrage, 48.

<sup>2</sup> Ms. in British Museum, quoted by Burrage, 49, 50.

<sup>3</sup> Id.

<sup>4</sup> Its text is found in Burrage, 56. Cf. Dexter, "John Smyth," 64.

<sup>5</sup> Quoted by Crooker ("The Unitarian Church," 15), who thus comments: "Several very important facts are evident at a glance: (1) Though these people were Calvinists, they did not make their Calvinistic beliefs the basis of their church organiza-

In London what has been called "the first important Independent church on English soil"<sup>1</sup> was organized by this formal expression of "common assent" on the part of the members. "Standing together," says Neal,<sup>2</sup> "they joined hands, and solemnly covenanted with each other, in the presence of Almighty God: To walk together in all Gods wayes and ordinances, according as he had already revealed, or should further make them known to them."

Thus on the eve of the Pilgrim migration to the New World, the idea of the covenant embodying the doctrine of "common assent" had become well established among a considerable section of the English religious community. Let us now turn aside to follow the introduction of these ideas into the troubled English political world.

### *C. Puritan "Associations" and Compacts*

At the beginning of the Puritan revolution the Parliamentary party encouraged the forming of a "bond of association" among its adherents. The plan was not wholly new in England. Something of the sort had been employed during the reign of Elizabeth as a means of insuring the allegiance of her subjects.<sup>3</sup> The purpose now was the support of Parliament in its contest with the king and the defence and preservation of Protestantism as the state religion.

tion or the test of their Christian fellowship. (2) This is not a promise to believe alike, but a promise to help one another to live better; 'to walk together,' not to think alike, — a simple and spiritual covenant, not a creed; an aspiration of the soul, not a theological confession. (3) These men of sturdy faith left the door open for progress. The anticipation of growth, and the expectation of larger wisdom, speak in every phrase of these covenants. Here we find the guarantee of liberty and the pledge of growth."

<sup>1</sup> Burrage, "The Church Covenant Idea," 79. It appears to have been the mother of "many of ye Independant and Baptist churches in London." — Id.

<sup>2</sup> "History of the Puritans," I, 462.

<sup>3</sup> "It was accorded in council that there should be a bond of union made by such noblemen and other principal gentlemen and officers as should like thereof, voluntarily to bind themselves to her Majesty and every one to other, for the defence of her Majesty's person against her evil willers." — Burghley to Lord Cobham (1584), quoted in Froude, "History of England" (New York, 1873), XII, 59.

"Every one in or about London who held office under the crown, gave their signatures immediately, and copies were sent round the English counties to the lords lieutenants and the mayors of the towns, inviting every loyal subject to enrol his name. The country replied with acclamations, undisturbed by a dissentient voice. The loyal signed in a passion of delight; the disloyal because they dared not refuse." — Id. 62.



We have seen how Norwich and the county of Norfolk were the chief recruiting ground of the Pilgrims. It and the adjacent counties now became the stronghold of Puritanism and remained such throughout the war. In December, 1642, Parliament passed an ordinance for the forming of an "Association" by these counties. The deputy lieutenants were directed to convene the people at different places and explain to them

"what present and imminent danger and necessity the whole kingdom is now reduced unto by the wicked advice, attempts, and conspiracies of papists and other persons now about His Majesty."<sup>1</sup>

As a result of this movement the following compact was adopted :

"Whereas the Lords and Commons now assembled in Parliament have taken into their consideration that in these times, so full of division and danger as these are, an union of our hearts and forces is most conducive to the public good and safety of the whole kingdom and have therefore ordained that the inhabitants of the counties of Essex, Suffolk, Norfolk, Cambridge and Hertfordshire, together with the isle of Ely and the county of the city of Norwich, should enter into an Association with one another for the maintenance and preservation of the peace of said counties: therefore, in pursuance of the said order and the better to form a mutual confidence in one another, we whose names are hereunto subscribed do hereby promise, testify and declare to maintain and defend with our lives, powers and estates, the peace of the said counties, and to aid and assist one another under the command and conduct of such person as now hath or hereafter shall have, by the authority of both Houses of Parliament, the command in chief of all the forces of the said counties, according to the true intent and meaning of the said Order of Association, whereunto we do most willingly give our assents, and neither for hope, fear or other respect shall we relinquish this promise."<sup>2</sup>

In this we find the same idea of union coupled with the necessity of obtaining the assent of all parties interested which is so prominent in the covenants. But this has more the character of a civil and military and less that of an ecclesiastical compact. We shall see compacts much like this adopted at the outbreak of the American Revolution.

After the signing of this instrument steps were taken to bring it before those not present at the time of its adoption. For "it was not enough," says Kingston,<sup>3</sup> "that the counties, through their deputy-lieutenants should pledge themselves; the bond of unity, to be effectual, must rest upon the common sentiment of the people."

<sup>1</sup> Kingston, "East Anglia and the Great Civil War" (London, 1897), 78.

<sup>2</sup> Id. 78, 79.

<sup>3</sup> Id. 79.

Accordingly printed instructions and "Books of the Association" in large numbers were distributed in the counties, meetings were held, addresses made and opportunity offered for joining the movement. Often these meetings themselves resulted in the adoption of compacts modelled upon that of the larger "Association." The following received the signatures of some forty of these sturdy yeomen:—

"Lavenham in Suffolk.

"Wee whose names are hereunder written doe hereby engage our selues to prouide Horses and Armes and to maintaine and finde att our owne proper Costs and Charges and att all times to haue in a Readiness for the seruice of this and those Other counties now Associated together by the Authority of Both Howses of Parliamentt: soe many men Compleatly Armed and Furnished, and such Horses, geldings, naggs and mares as we have seurally Respectiuey Subscribed, to be Comanded, led and conducted in to any partes and places within the said Countyes by such person as now hath or hereafter shall haue Comand in cheiff of all the Forces of the said Counties.

"vid. of Essex Suffolke, Norffolke  
Cambredgsheir and Herteforde Sheir  
together with the Isle of Ely and  
Cittie of Norwich."¹

So at Shimpling, a Suffolk village lying a few miles to the north-west, twenty-six names were appended to an instrument with the following preamble:—

"These whose names by vs are heir under written haue giuen ther Consents to Joine in th asotiation accordinge to th Booke of Directions and what Armes they will Finde as Followethe."²

"Multiply one of these parishes," observes Kingston,³ "by four or five hundred for the one county of Suffolk, and again by four or five, for the Associated Counties, and one has some idea of what the common sentiment of East Anglia was doing for Parliament with this bond of association."

Some of the documents of this period approach even more closely to the Scottish covenants in terms. Thus about the time of the adoption of the first Associated Counties Compact, noticed above, representatives of the counties of Cambridge, Buckingham, Bedford, and Hertford meet and subscribe an instrument in which they

"solemnly protest and covenant before God and one another that they will willingly and resolutely sacrifice their lives in this religious and just quarrel, and that

¹ Tanner Mss. cclxxxiv, f. 41; Kingston, 82, 83.

² Id. f. 45; Id.

³ "East Anglia and the Great Civil War" (London, 1897), 85.

they will never lay down their arms till this which is called the King's Army be dissolved." <sup>1</sup>

### *The "Sacred Vow and Covenant"*

It was not, however, until Parliament was stirred to its depths by the detection of the Waller conspiracy in the king's favor in 1643, that a real counterpart of the Scottish National Covenant appeared. Spurred by alarm at the boldness of the plot and the necessity of apprehending all who might be implicated, members of the House of Commons prepared an instrument which, to borrow the language of the great Cavalier historian, the Earl of Clarendon,<sup>2</sup>

"for the rareness of it both in title and style, I think necessary here to insert in the very terms; which were these:—

" 'A sacred vow and covenant taken by the lords and commons assembled in parliament upon the discovery of the late horrid and treacherous design for the destruction of this parliament and the kingdom: [the 6th of June 1643]

" 'Whereas there hath been, and now is, in this kingdom, a popish and traitorous plot for the subversion of the true protestant reformed religion, and the liberty of the subject; and in pursuance thereof a popish army hath been raised, and is now on foot in divers parts of this kingdom; and whereas there hath been a treacherous and horrid design, lately discovered by the great blessing and especial providence of God, of divers persons, to join themselves with the armies raised by the king, and to destroy the forces raised by the lords and commons in parliament, to surprise the cities of London and Westminster, with the suburbs; by arms to force the parliament; and finding by constant experience that many ways of force and treachery are continually attempted to bring to utter ruin and destruction the parliament and kingdom, and that which is dearest, the true protestant religion; and that, for the preventing and withstanding the same, it is fit, that all who are true hearted, and lovers of their country, should bind themselves each to other in a sacred vow and covenant;

" 'I A. B. in humility and reverence of the Divine Majesty, declare my hearty sorrow for my own sins and the sins of this nation, which have deserved the calamities and judgments that now lie upon it; and my true intention is, by God's grace, to endeavour the amendment of my own ways. And I do farther, in the presence of Almighty God, declare, vow, and covenant, that, in order to the security and preservation of the true reformed protestant religion, and liberty of the subject, I will not consent to the laying down of arms, so long as the papists, now in open war against the parliament, shall by force of arms be protected from the justice thereof: and that I do abhor and detest the wicked and treacherous design lately discovered; and that I never gave nor will give my assent to the execution thereof, but will, according to my power and vocation, oppose and resist the same, and all other of the like nature. And in case any other like design

<sup>1</sup> "Diurnal Occurrences in Parliament," Kingston, 76, 77.

<sup>2</sup> "History of the Rebellion and Civil Wars" (Oxford, 1849), III, 54-56.

shall hereafter come to my knowledge, I will make such timely discovery as I shall conceive may best conduce to the preventing thereof. And whereas I do in my conscience believe that the forces raised by the two houses of parliament are raised and continued for their just defence, and for the defence of the true protestant religion, and liberty of the subject, against the forces raised by the king; that I will, according to my power and vocation, assist the forces raised and continued by both houses of parliament, against the forces raised by the king without their consent; and will likewise assist all other persons that shall take this oath in what they shall do in pursuance thereof; and will not, directly or indirectly, adhere unto, nor shall willingly assist, the forces raised by the king without the consent of both houses of parliament. And this vow and covenant I make in the presence of Almighty God, the Searcher of all hearts, with a true intention to perform the same, as I shall answer at the great day, when the secrets of all hearts shall be disclosed."

The plan of submitting this document was hardly less comprehensive than that pursued with the Scottish covenant of five years before. It was designed "to be taken by the members of both houses, and afterwards by the city, and their army."<sup>1</sup> How far this design was carried out, we may learn from Clarendon, always remembering that his view as to the extent of popular, voluntary acceptance was obtained through hostile eyes.

"There was not a member of either house," he says,<sup>2</sup> "that took it not: and being thus fettered and entangled themselves, they sent their committee into the city, to acquaint them with their happy discovery, and how miraculously God had preserved them, and to engage them in the same sacred vow and covenant; which was readily submitted to; and, by the industry of their clergy, sooner than can be imagined, taken throughout that people. Then it was, with equal diligence and solemnity, transmitted to the army, that their fears of inconvenience from thence might be likewise purged; and thence it grew the mark of distinction, to know their friends and enemies by; and whosoever refused to take that covenant needed no other charge to be concluded and prosecuted as the highest malignant."

The immediate purpose of these Puritan documents of the revolutionary period was, of course, mainly military. But they were leading to constitutional results undreamed of by their framers. They were accustoming the people to joint and concerted action, taken with the assent of all, at least *pro forma*, as attested by a solemn written instrument which became effective when signed by all. In reading these documents one cannot fail to be impressed with their similarity in tone and phraseology to the town compacts which the

<sup>1</sup> "History of the Rebellion and Civil Wars" (Oxford, 1849), III, 54. <sup>2</sup> Id. 56, 57.

coreligionists of these Roundheads were at that moment adopting and living under across the sea. Both were products of the same fundamental doctrines of Puritanism and both embodied the germs and underlying ideas of the popularly ratified, written constitution.

#### *D. The Solemn League and Covenant*

The covenant idea had now received a practical application in the political life of the kingdoms on each side of the Tweed. An opportunity soon came to apply it to both jointly. At the beginning of the Puritan revolution the fortunes of war seemed to be rather against the parliamentary party. Fearing continued reverses and eventual defeat, they naturally turned for aid to their coreligionists of the north, who, like themselves, had been engaged in a struggle with the king. In July, 1643, before the echoes of the "sacred vow and covenant" had died away, a parliamentary commission, of which Sir Henry Vane the Younger was the leading spirit,<sup>1</sup> was sent to Scotland for the purpose of negotiating a formal alliance. The matter was taken up for consideration simultaneously by the Convention of the Estates of Scotland and the General Assembly, and these bodies followed the precedent with which they were most familiar. Their reply to the English commissioners was a proposal for a covenant, and they tendered an instrument<sup>2</sup> which was mainly a renewal of their National Covenant of 1638. This hardly met the ideas of the commissioners. "The English," observes the Scotch chronicler Baillie,<sup>3</sup> "were for a civil league; we for a religious covenant." But the English were in no position to dictate. Through Vane's efforts they secured the addition of the word "League" to the title of the instrument, making it sound more like their own, and the insertion of a phrase which they construed as committing them less strongly to the Presbyterian polity. Even these apparently unimportant

<sup>1</sup> Hosmer, "Life of Young Sir Henry Vane" (Boston, 1888), 173.

<sup>2</sup> Hosmer ("Life of Young Sir Henry Vane," 183) says that it was drawn by Alexander Henderson, presiding officer of the assembly, "the ablest and noblest of the Covenanters, the greatest name in the Scotch Kirk since the time of John Knox." Bisset observes: "These clauses (the first and second) were evidently drawn with care by lawyers, while most of the others savour strongly of the Presbyterian pulpit of that day." — "Omitted Chapters of the History of England" (London, 1864), I, 276, note. The instrument as finally adopted is printed in full in Clarendon, III, 216–219; also in Gardiner's "Constitutional Documents of the Puritan Revolution" (Oxford, 1889), 187; and in Adams & Stephens' "Select Documents of English Constitutional History" (New York, 1901), 383.

<sup>3</sup> "Letters and Journals," 374 *et seq.*

modifications were obtained only after a prolonged debate, and the covenant was agreed upon with the understanding, true to the common Calvinistic creed of both parties, that it should be subscribed by the people, not only of Scotland and England, but of Ireland also.

The instrument thus produced has been well called <sup>1</sup> "one of the most memorable documents in the history of the English-speaking race." It was entitled: "A solemn league and covenant for reformation and defence of religion, the honour and happiness of the king (*sic*) and the peace and safety of the three kingdoms of England, Scotland and Ireland."<sup>2</sup> But it is noticeable that in the body of the instrument it purports to be, not a covenant of the three kingdoms but of the people thereof. It recites that <sup>3</sup>

"We noblemen, barons, knights, gentlemen, citizens, burgesses, ministers of the gospel, *and commons of all sorts* in the kingdoms of England, Scotland and Ireland . . . have now at last . . . after mature deliberation, resolved and determined to enter into a mutual and solemn league and covenant wherein we all subscribe, and each one of us for himself, with our hands lifted up to the most high God, do swear," etc.

The manner of adopting the instrument was, in form at least, quite consistent with these recitals. In Scotland steps were taken to obtain the subscription of the people as in the case of former covenants. In England, after being signed by members of Parliament, the process is thus described by Clarendon: <sup>4</sup> —

"And they (the Commons) farther made a special order that all the ministers of parish-churches within London and Westminster, the suburbs, and the whole line of communication, should read and explain the covenant to their several congregations, and stir them up, the next fast day, to the cheerful taking of it: and particular care was taken, that all the students of the inns of court should be persuaded to receive it. But, over and above these general directions, there was a particular ceremony and application to recommend this covenant to the city and corporation of London."

"In February, 1644,

"the covenant was ordered to be taken throughout the kingdom of England by all persons above age of eighteen years; and the assembly were commanded to draw up an exhortation to dispose people to it." <sup>5</sup>

<sup>1</sup> Hosmer, "Life of Young Sir Henry Vane," 186.

<sup>2</sup> Clarendon, "History of the Rebellion and Civil Wars," III, 216.

<sup>3</sup> Id. 216, 217.

<sup>4</sup> Id. 220; cf. Burton, "History of Scotland," VI, 354 *et seq.*

<sup>5</sup> Neal, "History of the Puritans" (Parsons' Ed., London, 1811), II, 68, 69. "It was signed by many in every county of England." — Hanna, "The Scotch-Irish" (New York, 1902), I, 450.

It will be seen that, according to its title, the covenant was to include the people of Ireland. The manner of submitting it there has been related as follows:—

"On the 4th of November, 1643, Owen O'Connolloy was sent by Parliament to the commanders in Ulster, to make preparations for administering the Covenant in Ireland. For this purpose the Rev. James Hamilton and three other clergymen came over the next spring. On the 1st of April, 1644, they presented their commissions to the Presbytery, and soon afterwards began the work of receiving signatures. The regiments took the Covenant from their own chaplains, or if they had none, from the Scottish commissioners. Major Dalzell, who was afterwards noted as a great persecutor, was the only person connected with the army who refused to swear. Then came in crowds the people near the places where the regiments were stationed. They all joined willingly, except a few Episcopal ministers and some 'profane and ungodly persons; so that there were more of the country become swearers than were men in the army.' Those who had taken the Black Oath were compelled to renounce it publicly before being admitted to the Covenant. The commissioners appointed went from town to town to preach and explain the provisions of the document they carried. Having administered it in several places in Antrim and Down where troops were stationed, they set out for the extreme North. 'From Ballymena they went with a guard of horse toward Coleraine, under one William Hume of General Leslie's regiment. They went the next day (being Thursday) to the Church, and few being present except the soldiers of the garrison, they explained the Covenant to them, and left it to their serious thoughts till the next Sabbath, being also Easter day. On this Lord's day the convention was very great from town and country. They expounded more fully the Covenant, and, among other things, told the people that their miseries had come from those sorts of people who were there sworn against, and especially from the Papists.' . . . In this manner was the Covenant taken by the people throughout the greater part of Ulster. . . . From Coleraine they went to Derry, and from Derry to the Presbyterian parts of county Donegal. . . . In Ulster the Covenant was taken by about sixteen thousand persons besides the army."<sup>1</sup>

But these subscribers to the covenant were not the native Irish. They were really Scotchmen who, during the previous generation, had migrated across the North Channel and settled in the fertile lands of Ulster. These colonists were, as has been said of their descendants in America, "Protestants of the Protestants"<sup>2</sup> — sharers in the great movement led by Knox and Melville, and they did not leave Scotland until after two of its famous covenants had been signed. Indeed their settlement in Ireland was part of a scheme "to plant the country with Protestants."<sup>3</sup> In the early years of the seventeenth cen-

<sup>1</sup> Hanna, "The Scotch-Irish" (New York, 1902), I, 569, 570.

<sup>2</sup> Roosevelt, "The Winning of the West" (New York, 1889), I, 104.

<sup>3</sup> Hanna, "The Scotch-Irish," I, 493.

tury two influential Scotchmen obtained an extensive grant of land from an Ulster chief <sup>1</sup> and later a much larger acreage was confiscated by the English crown from rebellious Irish nobles.<sup>2</sup> It was upon these lands that the Scotch immigrants were settled. Beginning with 1606 they came in large numbers,<sup>3</sup> and soon succeeded in establishing a busy and prosperous colony.<sup>4</sup> These were the people who subscribed to the Solemn League and Covenant in 1643, and these were the ancestors of the sturdy race which, in the succeeding century, commenced the settlement of those middle and southern colonies of America where, outside of New England, the popular ratification of constitutions began. To them this last was no new experience. It was like the renewal of a covenant, the taking of which in their ancestral home was the most impressive episode in their history.

It has been objected that the ratification of the Solemn League and Covenant was "in no sense an approval,"<sup>5</sup> because provision was made for enforcing subscription. It is true that in Scotland "it was ordered . . . to be sworn to and subscribed all over the kingdom on penalty of the confiscation of goods and rents and such other punishment as his majesty and the parliament should inflict on the refusers."<sup>6</sup> But in view of the enthusiasm with which the National Covenant (practically the same instrument) had been received only five years earlier, it can hardly be supposed that the enforcement of the provisions above quoted was often necessary. Of the subscription in England, Neal says: <sup>7</sup>—

"It is certain most of the religious part of the nation who apprehended the protestant religion in danger, and were desirous of reducing the hierarchy of the church, were zealous for the Covenant. Others took it only in obedience to the parliament, being sensible of the distressed circumstances of their affairs, and that the assistance of the Scots was to be obtained on no other terms."

In Ireland also "it was given only to those 'whose consciences stirred them up,'" <sup>8</sup> and the historians do not seem to mention an

<sup>1</sup> Hanna, "The Scotch-Irish," Chap. XXXIII.

<sup>2</sup> Id., Chap. XXXIV.

<sup>3</sup> Hanna estimates that during the decade ending with 1618 "there must have been an immigration from Scotland of between 30,000 and 40,000." — Id. I, 504.

<sup>4</sup> Id., 502.

<sup>5</sup> Borgeaud, "Rise of Modern Democracy in Old and New England" (London, 1894), 3.

<sup>6</sup> Neal, "History of the Puritans" (Parsons' Ed., London, 1811), II, 68.

<sup>7</sup> Id. 69.

<sup>8</sup> Hanna, "The Scotch-Irish" (New York, 1902), I, 570.



instance in any of the three countries where the common people at least were coerced into signing.

But whether everywhere voluntarily subscribed or not, the lasting result of this, as of all the covenants, was the recognition of the people as a necessary contracting party in the making of a great national compact. "The mere fact," says Borgeaud,<sup>1</sup> "that the formal adhesion of the people was considered necessary, showed that the people were about to gain new rights." The requirement of their formal assent was a long step toward the doctrine that no such instrument should be valid until it should receive their actual assent.

### E. *"The Agreement of the People"*

In the year 1648, when the Puritan movement was at its height, there was presented to the House of Commons an instrument which is declared by an eminent writer to have been "in all substantial respects a draft for an American Constitution."<sup>2</sup> Another has said:—

"It was a real constitutional charter, founded on the direct acceptance of the people, and placed above the reach of the representative Assembly—a constitution in the sense in which the word is understood by the democracies of the United States and Switzerland to-day."<sup>3</sup>

This was the famous "Agreement of the People."<sup>4</sup> It was prob-

<sup>1</sup> "Rise of Modern Democracy in Old and New England," 30.

<sup>2</sup> Hosmer, "Life of Young Sir Henry Vane" (Boston and New York, 1888), 440.

<sup>3</sup> Borgeaud, "Rise of Modern Democracy in Old and New England" (London and New York, 1894), 43. Cf. Kidd, "Principles of Western Civilization" (New York, 1902), 106. The former also says (Id. 39): "When we read it and summarise the demands it contains we are astounded to find that it is nearly two centuries and a half old. The principles which it lays down are, for the most part, the very principles which contemporary democracy has just succeeded in establishing, or is still demanding. The sovereignty of the people; supreme power vested in a single representative assembly; the executive entrusted by the assembly to a council of state, elected for the term of one legislature; biennial parliaments; equitable and proportionate distribution of seats; extension of the right of voting and of election to all citizens dwelling in the electoral districts who are of full age, and neither hired servants nor in the receipt of relief; the toleration of all forms of Christianity; the suppression of state interference in Church government; the limitation of the powers of the representative assembly, by fundamental laws embodied in the constitution, especially with regard to the civil liberties guaranteed to citizens, these are the principles proclaimed by the English democrats in January, 1648-9."

<sup>4</sup> It is printed in full in "The Parliamentary History of England" (London, 1763), 519 *et seq.*; also in Gardner's "Constitutional Documents of the Puritan Revolution" (Oxford, 1889), 270 *et seq.*

ably drawn by Henry Ireton, a general in the Puritan army and a son-in-law of Oliver Cromwell. But unlike its less famous successor, — the "Instrument of Government," — it emanated from the rank and file and not merely from a *junta* of military officers.<sup>1</sup> The "Agreement" and its reputed author have been thus characterized :<sup>2</sup> —

"It was one more of those Army papers from the pen of this lawyer-soldier, which strike us yet as the supreme public documents of their time for weight, insight and constructive ability. The army . . . was the nursery of all that was best in the political thought of England at that day; but probably the most definite doctrinaire, the most inventive political thinker of the formal didactic kind, in the whole Army, was Commissary-General Ireton. One knows not how far he had hitherto been shaping the opinions of his colleagues to his own, or how far he had permitted theirs, and especially Cromwell's, to shape his."

Accompanying the draft of this instrument was a petition from the army in which the Commons were asked :—

"That according to the method propounded therein, it may be tendered to the people in all parts, to be subscribed by those that are willing, as petitions and other things of a voluntary nature are, and that, in the meanwhile, the ascertaining of these circumstances, which are referred to commissioners in several counties, may be proceeded upon in a way preparatory to the practice of it; and if upon the account of subscriptions (to be returned by those commissioners in April next), there appears a general or common reception of it amongst the people, or by the well affected of them, and such as are not obnoxious for Delinquency, it may then take place and effect, according to the tenour and substance of it."

Here, then, we have not only a proposed written constitution but a distinct recognition of the need of its popular ratification, and a provision therefor according to the mode of adopting a covenant.

#### *F. Vane's Proposal for a Constitutional Convention*

Eight years after the "Agreement of the People" was framed, and when the Puritan party had begun to dissolve, Sir Henry Vane the Younger, who will be remembered as one of the framers of the Solemn League and Covenant of 1643, put forth a work in which

<sup>1</sup> "A large part of both officers and the soldiers were republicans, and many adopted ultra-democratic theories." — Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, 219.

<sup>2</sup> Masson, "The Life of Milton in Connexion with the History of his Time," IV, 10. Others have ascribed to John Lilburne the principal share in the authorship of the "Agreement." — Foster, "Commentaries on the Constitution," 49.

<sup>3</sup> "The Parliamentary History of England" (London, 1763), 519.

he thought to save political Puritanism in England from impending disaster, through a plan which appears to have included the idea of popular ratification. He proposes a new form of government and urges that "a restraint be laid upon the supreme power before it be erected, in the form of a fundamental constitution." How this was to be brought about shall be told further in his own words:—

"The most natural way for which would seem to be by a general council or convention of faithful, honest, and discerning men, chosen for that purpose by the free consent of the whole body, . . . by order from the present ruling power, considered as general of the army. Which convention is not properly to exercise the legislative power, but only to debate freely and agree upon the particulars that, by way of fundamental constitutions, shall be laid and inviolably observed, as the conditions upon which the whole body so represented doth consent to cast itself into a civil and politic incorporation. . . . Which conditions so agreed . . . will be without danger of being broken or departed from, considering of what it is they are conditions, and the nature of the convention wherein they are made, which is of the People represented in their highest state of sovereignty, as they have the sword in their hands unsubjected unto the rules of civil government, but what themselves, orderly assembled for that purpose, do think fit to make."<sup>1</sup>

The constitutional convention, "chosen for that purpose by the free consent of the whole body," and designed "not properly to exercise the legislative power but only to debate freely and agree upon the particulars" etc., is generally supposed to mark the acme of American constitutional development and to represent our highest contribution to political science. Professor Dicey<sup>2</sup> says:—

"The constitutional convention . . . is by far the most valuable result of American inventiveness."

But here was the idea, developed and presented in almost its modern form, by this Puritan statesman of two centuries and a half ago. Truly the England of the seventeenth century seems to have been on the verge of reviving the ancient law-making privileges of its people. Had Puritanism continued in power what might not have resulted in this direction!

A survey of popular ratification in the British Isles during the period since the Reformation demonstrates clearly enough that the immediate source of it was the Calvinistic doctrine of common assent.

<sup>1</sup> "A Healing Question Propounded and Resolved" (1656).

<sup>2</sup> *Contemporary Review*, LVII, 511.

Apart from the Calvinists it had practically no advocates, and while they were in control the idea was introduced, or rather revived, in the affairs of state. But near as it sometimes appeared to realization and reestablishment, it always fell short of the results reached, even during the same period, in the Puritan commonwealths of the New World. From there, moreover, came not a little of the inspiration for whatever measure of success the movement attained in the mother country. It was no accident that Sir Henry Vane the Younger figured so prominently in connection with two of these important constitutional documents of the Puritan revolution. Of his part in these it might well have been said (as it was concerning his selection for another service) that it was due to his "having had a good part of his breeding under the holy ministers of New England."<sup>1</sup> Vane had been governor of Massachusetts Bay in the period of its infancy, and it was largely his experience there that he sought to apply in England. So Vane's "kindred spirit,"<sup>2</sup> Roger Williams, brought back to the mother country the results of his career in Rhode Island with its fruitful experiments in constitution-making.

Popular ratification in Great Britain was thus, in part at least, the consequence of a reaction from the colonies. Conditions there were more favorable to its full development,<sup>3</sup> and for the working out of its results we must follow it with the English Puritan to New England and with the Scotch Presbyterian to the southern colonies.

<sup>1</sup> From the "Mercurius Aulicus," a publication of the time, which gave this as a reason for choosing Vane as a coadjutor of the Earl of Essex in commanding the Puritan army. See Hosmer's "Vane," 163.

<sup>2</sup> Id. 66.

<sup>3</sup> "It was to be expected that tradition and long-established institutions would in the older country prevent the general acceptance of theories which in the colonies could be put into practice almost without resistance." — Osgood, "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, Pt. II, 215.

## CHAPTER VII

### POPULAR RATIFICATION IN COLONIAL AMERICA

#### NEW ENGLAND

##### *A. Massachusetts*

##### 1. *The Colony of New Plymouth*

A STRONG peculiarity of the New England colonies was the fact that their settlements were made by organized bodies rather than, as elsewhere, by individuals or unorganized groups of individuals. In many instances the New England colony was simply the transplantation of a Puritan church from the Old World to the New. Such was the case with New Plymouth. At the time of its foundation the body which formed the colony had enjoyed a distinct and continuous existence for nearly a score of years. It had originally been organized as a Puritan congregation at the hamlet of Scrooby in Nottinghamshire, from some remnant of the old Brownist or Separatist movement of the preceding century.<sup>1</sup> In 1606 it had called as its junior pastor John Robinson, who had been in charge of the English church near Norwich,<sup>2</sup> and who, like Brown, may be, therefore, supposed to have been somewhat under the peculiar spell and influence exercised by that ancient centre of guild life. In 1608, after several unsuccessful attempts, Robinson and his flock migrated to Holland, where circumstances held them for the next dozen years. Their sojourn here they never regarded as more than temporary, and they were continually planning a settlement in some other part of the world where they might be free from undesirable influences and find an opportunity to propagate their faith.<sup>3</sup> They applied to the English Virginia company for leave to settle in its

<sup>1</sup> Goodwin, "The Pilgrim Republic" (Boston, 1888), 16.

<sup>2</sup> Id. 26.

<sup>3</sup> Id. 38, 39.

territory, and their application, drawn by Robinson and Elder Brewster, strikingly reveals the character of their organization.

"We are knite together," it recites, "as a body in a moste stricte & sacred bonde and covenante of the Lord, of the violation whereof we make great conscience, and by vertue whereof we doe hould our selves straitly tied to all care of each others Good, and of ye whole by every one and so mutually."<sup>1</sup>

Primarily, then, this was a spiritual organization united by a covenant. Whatever functions it afterward acquired were incidental to a promotion of its religious objects. An appreciation of this fact is essential to an understanding of the later constitutional history of New England and, indeed, of America.

"The church at Leyden," says Osgood,<sup>2</sup> "when it opened negotiations with the Virginia company respecting a place of settlement, added to its religious functions the character of a business corporation. It sent agents to England to represent its interests there. Robinson himself was commissioned by it to negotiate with the Dutch West India Company. The reports of these agents were received and acted on by the church, — the same body, organized in the same way, as that which met for worship on the Sabbath. When they had resolved to migrate to New England, this congregation formed a joint stock company with the merchant adventurers at London."

### *The Mayflower Compact*

When this Pilgrim church finally embarked for the New World, it happened that there were fellow-passengers who were not of the same congregation. Moreover the region in which they found themselves at the end of their voyage was not included in their patent and the latter could not, therefore, provide for their civil government. In this emergency they followed precedent and tradition. They framed a new covenant, differing from the ordinary church instrument of that name chiefly in its provisions for civil affairs,<sup>3</sup> and to this they required the assent not only of the members of their own congregation but also that of the outsiders who had accompanied them, thus consciously or unconsciously following the model of the old guilds to which they have been compared.<sup>4</sup> This was the famous

<sup>1</sup> Bradford, "History of the Plimouth Plantation" (Deane's Ed., Boston, 1856), 32.

<sup>2</sup> "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, Pt. I, 16.

<sup>3</sup> "To this organization for religious and mercantile objects, political functions were added when the compact was signed in the cabin of the *Mayflower*." — Osgood, *Id.*

<sup>4</sup> Borgeaud, "The Rise of Modern Democracy in Old and New England" (London, 1894), 113.

"Mayflower agreement," — one (though by no means the first or last) of the ancestral documents in the genealogical line of our American constitutions and one whose importance warrants its incorporation here: —

"In ye name of God Amen! We whose names are under-written, the loyall subjects of our dread soveraigne Lord, King James, by ye grace of God, of Great Britaine, France, & Ireland king, defender of ye faith, &c, haveing undertaken for ye glorie of God and advancemente of ye Christian faith, and honour of our king and countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia, doe by these presents solemnly and mutually in ye presence of God, and one of another, covenant and combine our selves together into a civill body politick, for our better ordering and preservation and furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices from time to time, as shall be thought most meete and convenient for ye generall good of ye Colonie, unto which we promise all due submission and obedience.

"In witness whereof we have hereunder subscribed our names Cap-Codd ye 11 of November, in ye year of ye raigne of our soveraigne lord, King James, of England, and France, & Ireland ye eighteenth, and of Scotland ye fiftie-fourth. An<sup>o</sup>. Dom. 1620."<sup>1</sup>

It was formerly the fashion to regard this Mayflower document as isolated — *sui generis*. "This," says Bancroft, "was the birth of popular constitutional liberty."<sup>2</sup>

So John Quincy Adams declared: —

"This is perhaps the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all the individuals of the community to the association, *by which they became a nation*."<sup>3</sup>

In truth, however, as we have already seen, these Mayflower emigrants were doing nothing novel or unprecedented. They were simply applying the doctrine of "common assent," already a century old in Puritanism, in vogue for generations among the guilds, if not indeed previously practised for ages by the Teutonic ancestors of these Pilgrims. The occasion and after events made this Mayflower compact a conspicuous instance. It was, however, only an instance, which familiarity with preceding history shows to have been a perfectly natural one, and as it was not the first so it was also not the last. It led naturally to others.

<sup>1</sup> The text here followed is that of Goodwin, "The Pilgrim Republic" (Boston, 1888), 63, 64.

<sup>2</sup> "History of the United States" (London, 1876), I, 244. But cf. *infra*, p. 90.

<sup>3</sup> Quoted in Goodwin, "The Pilgrim Republic" (Boston, 1888), 65.

*Law-making in New Plymouth*

We have seen that the organization which founded New Plymouth was a Puritan church. For a long time it retained that character.

"That part of the church of Leyden which migrated to America," says Os-good,<sup>1</sup> "became a state, which, though it recognized the supremacy of the King, was for all immediate purposes independent. That state was formed precisely upon the model of the church; it was the politically active congregation. Both were expressly based on compact, or mutual consent; both were pure democracies."

Hence when the colony came to make its laws, it made them just as a Puritan congregation would, — by applying the doctrine of "common assent." During the first few years of its existence, the colony lived by a sort of general consent under the Mayflower instrument and the English common law.<sup>2</sup> In 1636 the following compact was made:—

"Wee the Associates of New Plymouth coming hether as free borne Subjects of the State of England Indowed with all and singulare the priviledges belonging to such being Assembled Doe ordeine constitute and enacte that noe acte Imposition law or ordinance bee made or Imposed vpon vs att prsent or to come but such as shalbee made and Imposed by consent of the body of the Associates or theire Representatives legally assembled, which is according to the free liberties of the State of England."<sup>3</sup>

In the same year, Elder Brewster and the pastor and certain of the deacons of the church were appointed as a sort of commission to prepare a code of laws.<sup>4</sup> They proceeded to reaffirm the Mayflower "combination" and declared:<sup>5</sup>—

"That according to the due priviledge of the subject aforesaid no imposicon law or ordnance be made or imposed vpon vs by ourselves [or others at] present or to come but such as shall be made [or] imposed by consent according to the free liberties [of the] State Kingdome of Engl. no otherwise."

<sup>1</sup> "The Political Ideas of the Puritans," *Political Science Quarterly*, VI, 16. "There was a state without king or nobles; . . . a church without a bishop . . . a people governed by grave magistrates which it had selected and equal laws which it had framed."—Rufus Choate, "Speech before the New England Society" (New York, Dec. 22, 1843).

"It (Calvinism) established a religion without a prelate; a government without a king." — Bancroft, "History of the United States," III, Chap. VI.

<sup>2</sup> Goodwin, "The Pilgrim Republic," 402.

<sup>3</sup> "Records of the Colony of New Plymouth" (edited by Pulsifer), XI, 78.

<sup>4</sup> Goodwin, "The Pilgrim Republic," 401.

<sup>5</sup> "Records of the Colony of New Plymouth," XI, 6.



It was also enacted <sup>1</sup> —

"That the lawes and ordinance of the Colony & for the Governmt of the same be made onely by the firemen of the Corporacon and no other."

By 1638 the same conditions, which in Old England and elsewhere had, as we have seen, operated partly at least to displace by the delegate system the practice of popular legislation, were at work in New Plymouth. Nevertheless, although the delegate plan was introduced, the idea of popular ratification was retained. In the year last named the General Court, which meant the entire body of male inhabitants, passed the following act:—

"Whereas complaint was made that the freemen were put to many inconveniences and great expences by their continuall attendance at the Courte It is therefore enacted by the Court for the ease of the seuell Colonies and Townes within the goument That euery Towne shall make choyce of two of their freemen and the Towne of Plymouth of foure to be Committees or Deputies to joyne with the Bench to enact and make all such lawes and ordinances as shalbe judged to be good and wholesome for the whole Prouided that the lawes they doe enacte shalbe ppounded one Court to be considered vpon vntill the next Court, and then to be confirmed if they shalbe approued of (except the case require prsent confirmation) And if any act shalbe confirmed by the Bench and Committees wch vpon further deliberacon shall proue prjudiciall to the whole That the firemen at the next elecon Court after meeting together may repeale the same and enact any other vsefull for the whole And that euery Towneship shall beare their committees charges and that such as are not freemen but have taken the Oath of fidelitie and are masters of famylies and Inhabitante of the said Townes as they are to heare their pt in the charges of their Committees so to haue a vote in the choyce of them, pvided they choose them onely of the freemen of the said Towne whereof they are: but if any such comittees shalbe insufficient or troublesome that then the Bench and thother comittees may dismiss them and the Towne to choose other fireem in their place."<sup>2</sup>

The delegate system does not, however, seem to have worked altogether satisfactorily, and there was at least a temporary and partial return to the old method. In the proceedings of the General Court for 1646 appears the following:<sup>3</sup>—

"Whereas the Townes formerly were to send their deputies (wch must arise out of there free men) to attend the 3 generall Courte of the yeare for our Sovereigne Lord the Kinge, now vpon the speciall complainte of the deputies of the Townes soe sent professinge them to be oppressed thereby, It is ordered enacted that the whole body of free men appeare at the Election Courte wch is the first tuesday in June excessiue, there to make or repeale such lawes, orders, ordinance

<sup>1</sup> "Records of the Colony of New Plymouth" (edited by Pulsifer, Boston, 1861), XI, 11.

<sup>2</sup> Id. 31.

<sup>3</sup> Id. 54.

as shalbe fownde meet wholesome for the orderinge of the Goument that then also they present such deputies as haue bene chosen by their Townes accordinge to order formerly established, who are to attend the same, its seuerall adjourmte as the occasions of the Country shall require, that whatsoever laws, orders, ordinances shall be made or repealed be at that Courte the seuerall adjourmte thereof onely done, the other Courte to attend onely matters of Judicature the magistrates onely to attend the same."

## 2. *The Colony of Massachusetts Bay*

Unlike New Plymouth, its predecessor, the colony of Massachusetts Bay was, as we have seen, a trading corporation, organized on the model of the mediæval guilds. The ultimate objects of the company were, however, religious, and a section of it, which afterward settled at Dorchester, was organized as a church before leaving England.<sup>1</sup> And while this colony may have been less democratic<sup>2</sup> than New Plymouth, whose nucleus was the Pilgrim congregation, still the guild organization coupled with the Puritan doctrines combined to produce important results in the way of popular legislation. The first charter of the colony was in the king's name and nominally issued from the crown, but its provisions were drafted by the original members.<sup>3</sup> Among these provisions was the following:<sup>4</sup>—

"That the Governor, or, in his absence, the Deputie Governor, of the saide Company for the tyme being, and such of the Assistant and freemen of the saide Company as shalbe present or the greater number of them soe assembled, whereof the Governor or Deputie Governor and six of the Assistants, at the least to be seaven, shall have full power and authoritie to choose, nominate, and appointe such and soe many others as they shall thinke fitt, and that shall be willing to accept the same, to be free of the said Company and Body, and them into the same to admitt, and to elect and constitute such offices as they shall thinke fitt and requisite for the ordering, managing, and dispatching of the affaires of the saide Governor and Company and their successors, And to make Lawes and ordinances for the good and welfare of the saide Company, and for the government and ordering of the saide lands and plantacon, and the people inhabiting and to inhabite the same, as to them from tyme to tyme shal be thought meete. Soe as such lawes and ordinances be not contrairie or repugnant to the lawes and statutes of this our realme of England."

<sup>1</sup> Burrage, "The Church Covenant Idea," 87.

<sup>2</sup> Borgeaud, "Rise of Modern Democracy in Old and New England" (London, 1894), 142 *et seq.*

<sup>3</sup> Parker, "The First Charter and the Early Religious Legislation of Massachusetts," *Lowell Institute Lectures*, 362.

<sup>4</sup> "Records of Massachusetts Bay" (Shurtleff's Ed., Boston, 1853), I, 11, 12.

This was conferring upon the company the law-making functions of a guild. In 1629, while the headquarters of the company and the greater portion of its membership were still in England, a frame of government for the corporation in its new home was adopted which contained the following preamble:<sup>1</sup>—

"Whereas the Kings most excellent Maty hath bin graciously pleased to erect & establish vs, by his lettres pattents, vnder the great seale of England, to bee a body corporate, entytuled the Gounor & Company of the Mattachusetts Bay in New England, and therby hath endowed vs wth many large & ample pruiledges & imunities, wth power to make good & wholesome lawes, orders, & ordinances, for the better maintenance & support of the said pruiledges, and for the better & more orderly & regular gounmt, to bee observed in the psecucon & ppagacon of or intended voyages & the plantacon there, authorising vs to nominate, & appoint, & select fitt psons amoungst orselves for the manag-ing, ordering, & gouning of or affaires, both in England & in the places speyed & graunted vnto vs by vertue of his mats charter, wee haue, in the psecucon of the said power & authoritie giuen vs, & in conformitie therevnto & to the purpose & intent thereof, & not otherwise, thought fitt to settle and establish an absolute gounmt at or plantacon in the said Mattachusetts Bay in New England, wch, *by the vote & consent of a full & ample Court now assembled, is thought fitt, & ordered as followeth.*"

But while this colony was not like its southern neighbor actually formed by the transplantation of a church, it soon became one and that, too, by the formation of a covenant. In the same year of the adoption of the frame of government above mentioned, but after the arrival at Salem, the members adopted the following:—

"We Covenant with the Lord and one with another; and doe bynd ourselves in the presence of God, to walke together in all his waies, according as he is pleased to reveale himself unto us in his Blessed word of truth."<sup>2</sup>

This was renewed by the adoption in 1636 of a much more elaborate instrument,<sup>3</sup> which was subscribed by the members and meanwhile in 1630 branches of the colony settling at Charlestown and Watertown adopted similar covenants.<sup>4</sup>

After the colony had actually become settled in New England popular legislation seems to have been less in vogue than in the older colony of New Plymouth. Indeed, the delegate system appeared earlier in the younger colony, but this was provided by the

<sup>1</sup> "Records of Massachusetts Bay" (Shurtleff's Ed., Boston, 1853), I, 361.

<sup>2</sup> Burrage, "The Covenant Idea," 88; Crooker, "The Unitarian Church," 15.

<sup>3</sup> Its text is given in Burrage, 89, 90.

<sup>4</sup> Id. 91-93.

people themselves. Thus at the General Court held in Boston in 1630:<sup>1</sup>—

"It was pppounded if it were not the best course that the ffreemen should haue the power of chuseing Assistants when there are to be chosen, & the Assistants from amongst themselves to chuse a Gounr & Deputy Gounr, whoe wth the Assistants should haue the power of makeing lawes & chuseing officers to execute the same. This was fully assented vnto by the genall vote of the people, & ereccon of hands."

Again in 1634 it was agreed,<sup>2</sup> "That none but the Genall Court hath power to make and establishe lawes."

But like their germs and predecessors, the Anglo-Saxon shire-moots and Witenagemote, the General Court, at least for the election of magistrates, appears to have included in practice no less than, in theory, the whole body of the freemen. For in 1635<sup>3</sup>

"It is ordered, that the Genall Court, to be holden in May nexte, for eleccon of magistrates, &c, shalbe holden att Boston, & that the townes of Ipswch, Neweberry, Salem, Saugus, Waymothe, & Hingham shall have libertie to stay soe many of their ffreemen att home, for their safty of the towne, as they iudge needefull, & that the saide ffreemen that are appoyncd by the towne to stay att home shall have liberty for this Court to send their voices by pxy."

It is clear from this that at such a meeting all freemen were expected to attend and were only excused for the reasons named. Moreover, we see here an additional reason for the substitution of proxy, for direct, legislation. The colonists had begun to settle some distance from Boston, and it was not merely inconvenient but dangerous for all to attend and leave their homes exposed to attack by the Indians.

But while these and other causes operated to establish the delegate system in Massachusetts Bay sooner than in New Plymouth, still the former colony was not without experience as regards both the initiation and ratification of laws. At the General Court in 1637-1638, the following appears among the proceedings:<sup>4</sup>—

"For the well ordering of these plantations now in the begining thereof, it havinge bene found by the little time of experience wee have heare had, that the want of written lawes have put the Court into many doubts & much trouble in many particuler cases, this Court hath therefore ordered that the freemen of every

<sup>1</sup> "Records of Massachusetts Bay" (Shurtleff's Ed., Boston, 1853), I, 79.

<sup>2</sup> Id. 117.

<sup>3</sup> Id. 166. Cf. 188.

<sup>4</sup> Id. 222.

towne (or some part thereof chosen by the rest) wthin this Iurisdiction shall assemble together in their severall townes, & collect the heads of such necessary & fundamentall lawes as may bee sutable to the times & places whear God by his pvidence hath cast vs, & the heads of such lawes to deliver in writing to the Governor for the time being before the 5th day of the 4th month, called June, next, to the intent that the same Governor, together with the rest of the standing counsell, & Richrd Bellingham, Esq., Mr. Bulkley, Mr. Philips, Mr. Peters, & Mr. Sheopard, elders of severall churches, Mr. Nathaniell Ward, Mr. Willi: Spencer, & Mr. Will: Hawthorne, or the Major part of them, may, vpon the survey of such heads of lawes, make a compendius abrigment of the same by the Generall Court in autume next, adding yet to the same or detracting therefrom what in their wisdomes shall seeme meete, that so the whole worke being pperfected to the best of their skill, it may bee psented to the Generall Court for confirmation or reiection, as the court shall adjudge."

This reads like an early instance of the initiative. Shortly afterward we find an example of the referendum. In 1639 <sup>1</sup>

"it is ordered, that the Governor, Deputy Governor, Treasurer, & Mr. Stoughton, or any three of them, with two or more of the deputies of Boston, Charles towne, or Roxberry shall pervse all those modellis, wch have bene, or shalbee further psented to this Court, or themselves, concerning a forme of government, & lawes to bee established, & shall drawe them vp into one body, (altering, ading, or omiting what they shall thinke fit,) & shall take order that the same shalbee coppied out & sent to the severall townes, that the elders of the churches & freemen may consider of them against the next Generall Court, & the charges thereof to bee defrayed by the Treasurer."

Finally in the record of a session of the General Court held in 1641 appears the following entry: <sup>2</sup>—

"At this Court, the bodye of laues formerly  
sent forth amonge the ffreemen, &c,  
was voted to stand in force, &c."

In all this we observe the preparation of the Massachusetts Bay Colony for popular constitution-making. That their descendants in the following century employed the same methods is not singular. It would have been strange indeed, had they ignored these precedents of the formative period of their commonwealth.

### *Popular Legislation in the Towns*

Meanwhile a system of popular legislation was being developed in the towns, as is illustrated by the case of Dorchester, where, in October, 1633, it was

<sup>1</sup> "Records of Massachusetts Bay" (Shurtleff's Ed., Boston, 1853), I, 279. <sup>2</sup> Id. 346.

"Ordered that for the general good and well ordering of the affairs of the plantation there shall be every Monday before the court by eight o'clock A.M. and presently by the beating of the drum, a general meeting of the inhabitants of the plantation at the meeting house, there to settle and set down such orders as may tend to the general good as aforesaid and every man to be bound thereby without gainsaying or resistance."

and that,

"All things concluded as aforesaid shall stand in force and be obeyed until the next Monthly meeting and afterwards if it be not contradicted and otherwise ordered at said monthly meeting, by the greatest vote of those present as aforesaid."<sup>1</sup>

"This formal document," says Mowry,<sup>2</sup> "will answer for a constitution."

In 1636 the General Court ordered that "the freemen of every town or a major portion of them . . . make such laws and constitutions (*sic*) as concern the welfare of their town . . . not of a criminal but of a prudential nature."<sup>3</sup>

### 3. *The New England Confederation*

So strong indeed was the force of this custom that in 1643 when the New England Confederation was formed the delegates or commissioners from New Plymouth referred the Articles of Confederation to the people of their colony and refrained from signing until these had received the popular assent.<sup>4</sup>

The Articles of Confederation were agreed upon at a meeting of the commissioners at Boston on May 19, 1643, but the delegates from New Plymouth, Edward Winslow and William Collyer, withheld their signatures from the instrument until the people of their colony were given an opportunity to pass upon its provisions.<sup>5</sup> Not only did the General Court of New Plymouth order that the delegates should

"have full commission and authority, in name of the whole Court, to subscribe the articles of confederacon (now read in the Court) with the Massachu-

<sup>1</sup> "Dorchester Town Records" (in the 4th Report of Boston Record Commission), *New England Magazine*, II, 108.

<sup>2</sup> "Influence of John Calvin on the New England Town Meeting," *Id.* 108.

<sup>3</sup> *Id.* 108, 109.

<sup>4</sup> "Colonial Laws of Massachusetts" (Whitmore's Ed.), I, 7 *et seq.*

<sup>5</sup> "Records of the Colony of New Plymouth" (edited by Pulsifer, Boston, 1859), IX, 9.

setts, Conectacutt, and New Haven, and to subscribe the same in name of the whole, and to affix thereto the comon seale of the goument,"<sup>1</sup>

but the question was submitted to and approved by the town meetings. One record of the ensuing commissioners' meeting is as follows:—

"At a meeting of the Comissioners for the confedacon held at Boston the seauenth of Septembr, It appeareing that the Genall Court of New Plym *the seuall Towneships thereof* haue read considered approued these Articles of confederacon, as appeareth by comission from their Genall Court beareing date the XXIXth of August, 1643 to Mr. Edward Winslow, Mr. Willm. Collyer to ratifye and confirme the same on their behalf wee therefore the comissioners for the Mattachusetts Conecktacutt New Haven doe also for or seuall Gouments subscribe vnto them."<sup>2</sup>

Another version is the following:—

"The Articles of Confederacon agreed at Bostone the XIXth of May last being now read Mr. Edward Winslow Mr. William Collyer Comissioners for the Jurisdiccon of New Plymouth deliuered in an Order of their Genall Court Dated the XXIXth of August, 1643 by wch it appeares that the said Articles of the XIX of May weere read approued and confirmed by the said Genall Court *by all their Townships* and they, the sd Mr. Winslow & Mr. Collyer were both authorized to ratifie them by their subscriptions and chosen sent as Comissioners for that Jurisdiccon with full power to treate and conclud in all matters concerneing warr and peace according to ye tenor and true meaneing of the said Articles of Confederacon for this prsent meetinge."<sup>3</sup>

Thus during more than a quarter of a century, including its formative period, the inhabitants of these colonies enjoyed a more or less complete system of direct popular legislation. And why should they not? They had brought it with them and had practised it in a measure in their old home. They needed no urging in this direction then, nor did their descendants in the following century when they came to separate from Great Britain and frame their fundamental law. The example of the Pilgrim Republic was sufficient.

### B. Rhode Island

#### 1. Popular Ratification in the Towns

Civic life in Rhode Island began, not in the form of a central colonial government, but in the separate towns, which at first had

<sup>1</sup> "Records of the Colony of New Plymouth" (edited by Pulsifer, Boston, 1855), II, 56.

<sup>2</sup> Id. IX, 8.

<sup>3</sup> Id. 9.

no political connection with each other. In each, however, the inhabitants adopted a compact or instrument of government in which the element of popular approval is the most conspicuous feature. Thus on the settlement of Providence in 1636, the colonists adopted and signed the following:<sup>1</sup>—

"We whose names are hereunder, desirous to inhabit in the town of Providence, do promise to subject ourselves in active and passive obedience to all such orders or agreements as shall be made for public good of the body in an orderly way by the major consent of the present inhabitants, masters of families incorporated together in a Towne fellowship, and others whom they shall admit unto them only in civil things."

The next year the colonists had occasion to pass on a report of certain of their number who had been chosen as arbitrators. The report contained not only a scheme for the arbitration of differences among the colonists, but also provisions regarding land titles and boundaries and "proposals for a form of government."<sup>2</sup> This relatively elaborate piece of legislation was laid before the inhabitants and not put into force until it had received their assent manifested by their signatures, their names being signed immediately below those of the arbitrators who present the report.<sup>3</sup>

The town of Portsmouth was organized in 1638 under a compact adopted and signed by the inhabitants, which reads as follows:—

"We whose names are underwritten do here solemnly in the presence of Jehovah incorporate ourselves into a Bodie Politick and as he shall help, will submit our persons lives and estates unto our Lord Jesus Christ, the King of Kings and Lord of Lords and to all those perfect and most absolute lawes of his given us in his holy word of truth, to be guided and judged thereby."<sup>4</sup>

In other words, we find here, as in many other New England settlements, an adoption of the Bible as the law of the land, and this

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 14. "From the momentous consequences that have resulted from it," says Mr. Amasa M. Eaton, "it is certainly one of the most famous compacts of government ever drawn."—*Harvard Law Review*, XIII, 449.

Strangely enough, however, when the church was organized two years later, — the first Baptist church in America, — no covenant was adopted. See Burrage, "The Church Covenant," 95.

<sup>2</sup> "Records of the Colony of Rhode Island," I, 27 *et seq.*, where the report is set out in full.

<sup>3</sup> *Id.* 31.

<sup>4</sup> *Id.* 52. Certain citations to Old Testament texts follow the portion here set forth.



was accomplished by the voluntary action of the inhabitants in the form of a covenant. A new compact reaffirming and extending the obligations of the old was adopted in the following year.<sup>1</sup>

The subsequent records of the same town disclose that all matters, even the minutest, that could be regarded as of common interest, were brought before the town meeting, and in order to insure general participation so that the voice of the whole people might be heard,

"It is ordered that if any of the Freemen of this Body shall not repair to the publick meetings to treat upon the publick affairs of the Body upon publick warning (Whether by beate of the Drumm or otherwise) if they fayle one quarter of an houre after the second sound, they shall forfeitt twelve pence; or if they depart without leave they are to forfeitt the same summ of twelve pence."<sup>2</sup>

The colonists of Newport in 1639, before they had actually settled at their proposed location, adopted and signed a compact in which they declared "that our deliberations shall be by major voice of judge and elders."<sup>3</sup> Two years later at a "General Court" of the inhabitants held at Portsmouth, which legislated extensively and seemingly for both Newport and Portsmouth, which were situated on the same island,

"It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favor of our Prince, is a *Democracie* or Popular Government; that is to say, It is in the Powre of the Body of Freemen, orderly assembled or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."<sup>4</sup>

Thus in these separate towns of primitive Rhode Island we find all the marks of a pure democracy. The people are not merely the source of legislative power, — they are the legislators. As Bancroft well says: —

"This first system had its decisive influence on the whole political history of Rhode Island."<sup>5</sup>

## 2. *Popular Legislative System Perfected*

The first charter of the colony of Rhode Island is styled a patent for "the Incorporation of Providence Plantations in the Narragansett

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 70.

<sup>2</sup> Id. 57.

<sup>3</sup> Id. 87.

<sup>4</sup> Id. 112.

<sup>5</sup> "History of the United States" (Rev. Ed., Boston, 1878), I, 301.

Bay in New England,"<sup>1</sup> and bears date 1643. It confers on the inhabitants

"full power and authority to rule themselves, and such others as shall hereafter inhabit within any part of the said tract of land by such a form of Civil Government as by *voluntary consent of all, or the greater part of them*, they shall find most suitable to their estate and condition."<sup>2</sup>

Pursuant to the liberal provisions of this instrument the freemen of the four colonies of Providence, Newport, Warwick, and Portsmouth met at the last named in "general court" on May 19, 1647, and continued in session for several days.<sup>3</sup> One of the important results of this meeting was an advanced and comprehensive code of laws, a prominent feature of which is the increasing recognition of the right of popular participation in law-making. Thus:—

"It was unanimously agreed, That we do all owne and submit to the Lawes as they are contracted in the Bulke with the Administration of Justice, according thereto, which are to stand in force till the next Generall Courte of Election, and every Towne to have a Coppie of them, and then to present what shall appear therein not to be suitable to the Constitution of the place, and then to amend it."<sup>4</sup>

Having thus announced the general principle which is to govern the mechanics of legislation in Rhode Island, its details are more fully prescribed as follows:—

"II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded . . . The Towne where it is propounded shall agitate and fully discuss the matter in their Towne Meetings and conclude by Vote; and then shall the Recorder of the Towne, or Towne Clerke, send a copy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if vnto them or any of them some case or cases shall be presented that may be deemed necessary for

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 143 *et seq.*

<sup>2</sup> *Id.* 146.

<sup>3</sup> *Id.* 147. Cf. "Book Notes" (Providence, 1894), May 5, 1894.

<sup>4</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 148. (Sec. 7 of the Code.)

the public weale and good of the whole, they shall fully debate, discuss and determine ye matter among themselves: and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."<sup>1</sup>

Arnold, the historian of Rhode Island, comments as follows upon this unique system of popular legislation:—

"All laws were to be first discussed in the towns; the town first proposing it was to agitate the question in town meeting and conclude by vote. The town clerk was to send a copy of what was agreed on to the other three towns, who were likewise to discuss it and take a vote in town meeting. They then handed it over to a committee of six men from each town, freely chosen, which committees constituted 'the General Court,' who were to assemble at a call for the purpose, and, if they found the majority of the colony concurred in the case, it was to stand as a law, 'till the next General Assembly of all the people' who were finally to decide whether it should continue as law or not. Thus the laws emanated directly from the people. The General Court had no power of revision over cases already presented, but simply the duty of promulgating the laws with which the towns had intrusted them. The right to originate legislation was, however, vested in them, to be carried out in this way. When the court had disposed of the matters for which it was called, should any case be presented upon which the public good seemed to require their action, they were to debate and decide upon it. Then each committee, on returning to their town was, to report the decision, which was to be debated and voted upon in each town; the votes to be sealed and sent by each town clerk to the General Recorder, who, in presence of the President, was to count the votes. If a majority were found to have adopted the law, it was to stand as such till the next General Assembly should confirm or repeal it. The jealousy with which the people maintained their rights, and the checks thus put upon themselves in the exercise of the law-making power, as displayed in this preliminary act, present most forcibly the union of the two elements of liberty and law in the Rhode Island mind."<sup>2</sup>

Thus more than a century and a quarter before the first state constitutions were framed the inhabitants of the little commonwealth of Rhode Island were applying in ordinary legislation the system

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 148, 149. Mr. Amasa M. Eaton observes: "It is believed that in this statute is found the earliest known instance of the initiative and referendum now so much admired in the Swiss constitution." *Harvard Law Review*, XIII, 584. We shall see, however, that the referendum principle had already been employed in Connecticut, in amending the "Fundamental Orders," *post*, 89 *et seq.*

<sup>2</sup> Arnold, "History of Rhode Island" (New York, 1859), I, 203, 204.

which was ultimately to prevail in adopting the organic laws of the great states of the American Union.

### 3. *Rise of the Delegate System*

Up to the middle of the seventeenth century, then, the polity of Rhode Island, both in the individual towns and in the united colony, was that of a pure democracy — one of the best examples, indeed, of that form of government which may be found in all history. But with the growth of the colony there came a change from the system of direct popular participation to that of delegation, and this change is marked by innovations in the manner of enacting laws.

In 1650 the General Court, meeting at Newport, voted to confer its powers upon a "Representative Committee" consisting of six from each town.<sup>1</sup> This body, later in the same year, amended the statute providing for popular ratification of laws as follows:—

"It is ordered that from henceforth the representative committee being assembled and having enacted law or lawes, the said lawes shall be returned within six dayes after the breaking up or adjournment of that Assemblie; and then within three days after the chiefe officer of the towne shall call the Towne to the hearing of the Lawes so made; and if any Freeman shall mislike any law then made, they shall send their votes with their names fixed thereto vnto the General Recorder within tenn dayes after the reading of thoss lawes and no longer. And if itt appeare that the major vote within that time prefixed, shall come in and declare itt to be a nullity, then shall the Recorder signifie it to ye President, and the President shall forthwith signifie to ye Townes that such or such lawes is a null, and the silence to the rest shall be taken for approbation and confirmation of the lawes made: And it is ordered further, that the eleventh lawe made at Portsmouth, May 20, 21 — 1647 — is repealed."<sup>2</sup>

In May, 1653, this Court of Commissioners or delegates enacted "that all orders made by the townes, either joyntlie or apart, by authoritie of the charter, be authorized to be in force until by a General Assemblie repealed." And further ordered

"that all the inhabitants that allowed the propositions sent to each towne, sett to, or subscribe their names for confirmation thereof."<sup>3</sup>

In 1658 the same court in session at Warwick enacted the following:—

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 228; "Book Notes" (Providence, 1894), May 5, 1894.

<sup>2</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 229.

<sup>3</sup> *Id.* 260; "Book Notes" (Providence, 1894), May 5, 1894.

"Whereas, it is conceived a wholesome liberty for the whole or major parte of the free inhabitants of this collony orderly to consider of the lawes made by the Commissioners' Courts: and upon finding discommodity in any law made by the sayd court, then orderly to show their dislike, and soe to invalid such a law.

"It is therefore ordered and declared by this present Assembly, that from henceforth the Generall Recorder upon (such) pennalty as shall be Judged meete by a court of commissioners, shall send into each towne a coppie of the lawes that are made at such courts, soe as they may be delivered to the Towne Clarke of each towne within ten daies after the dissolution of each court from time to time; and then the townes to have tenn daies time longer to meete and publish the sayd lawes, and to consider of them. And in case the free inhabitants of each towne, or the major parte of them doe in a lawfull assembly vote down any law, and seale up the voates, and send them to the Generall Recorder within the sayd tenn daies: and that by the voates it doth appeare that the major parte of the people in each towne have soe dissalowed it, then such a law to bee in noe force; and otherwise if that bee not soe done within the twenty daies after the dissolution of each court, then all and every law to be in force: And however all to be in force that are not soe disannulled, and the townes shall pay the charge of sendinge the fore sayd coppies. Further, the Recorder is to open the sayd voates before the President, or in his absence, before the Assistant of the Towne where the Recorder lives, and then the President or such Assistant to give notice to the rest of the majestates." <sup>1</sup>

Two years later a change is made by which ratification by a majority of the voters of the entire colony is accepted in lieu of a majority of those in each town,<sup>2</sup> and by which the period is lengthened within which laws may be disapproved. The General Court meeting at Portsmouth in 1660 provided: —

"Whereas, there is a certayne clause in a law made at Warwick, November the 2d 1658, touthching the people's libertie to disannull any law to them presented from the Courts of Commissioners, as there is premised: by which clause it seems the priviledges are not soe clearly evinced as the Commissioners thereby and therein did intend in formeinge the same law, in regard of this clawse (that the major parte of each Towne in the Collony must send in their voates of their towne to the Generall Recorder, to disallow any law that should be soe presented, within tenn daies after it is presented to the Towne, if they conceive such, or any such law not wholesome). It is therefore ordered, by the authority of this present Assembly, that the aforesaid clause be rectified, and that instead thereof it be enacted, and it is hereby enacted, that there be three months time, that is to say, fowre score and six daies alowed for the returne of the voates from each towne unto the General Recorder after that such lawes be presented (in such order and time as by the foresayd law is provided) to each towne:

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 401, 402.

<sup>2</sup> "This was a great step toward consolidation of the united government." — Eaton, "The Right to Local Self-Government," *Harvard Law Review*, XIII, 587.

"As alsoe wee further enact that it appearinge by the returne of the voates, that the major parte of the free inhabitants of this Collony have disapproved or disannulled any such law or lawes, then the sayd law or lawes to be of noe force; although any one towne or other should be wholly silent therein, Or otherwise such law or lawes to be in force according to the true intent of the other parte or clause in the abovesayd law of November the 2d 1658; and this foresayd addition to stand and be in full force, any law or lawes, or any clawes or clawes in any former law contayned, to the contrary notwithstandinge."<sup>1</sup>

The principle of popular ratification was therefore still preserved notwithstanding the change from direct to delegate legislation.

#### 4. *Decline of Popular Law-making*

The second charter of Rhode Island was granted by Charles II,<sup>2</sup> and was one of the results of the mission of John Clarke, the colony's agent in England,<sup>3</sup> who was assisted by Roger Williams and young Sir Henry Vane.<sup>4</sup> It is a notable instrument in American history, and one of its marks of distinction is the fact that it continued in force far beyond colonial times.<sup>5</sup>

But though denominated "republican,"<sup>6</sup> its effects (probably unforeseen and unintended) upon Rhode Island's democratic system of law-making were disastrous. *Inter alia* it empowered the general assembly, consisting of the governor, "assistants," and representatives from the towns,

"To make, ordeyne, constitute or repeal such lawes, statutes, orders and ordinances, formes and ceremonies of government and magistracys as to them shall seeme meete for the good and welfare of the sayd gournour and company."<sup>7</sup>

This grant appears to have been construed as exclusive and as conferring upon the assembly the sole power, at least of repealing laws. For the very next year (1664) the assembly sitting at Newport enacted: —

"That whereas ther are several lawes extant amongst our former lawes inconsistent with the present Government, as houlding of Courts of Commitions, and repealing of the acts of the General Assemblies by votings in town meetings

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), I, 429.

<sup>2</sup> *Id.* II, 3.

<sup>3</sup> Arnold, "History of Rhode Island" (New York, 1859), I, 284. See the minutes of a vote of thanks by the colony to Clarke. *Id.* I, 510.

<sup>4</sup> Borgeaud, "Rise of Democracy in Old and New England" (London, 1894), 159.

<sup>5</sup> See *post*, Chap. XIII.

<sup>6</sup> Arnold, "History of Rhode Island" (Providence, 1856), I, 294, 295.

<sup>7</sup> "Records of the Colony of Rhode Island" (Providence, 1856), II, 9.

together with several other of like nature, which are contradictory to the forme of the present government, erected by his Majestyes and gracious letters pattent, that all such lawes be declared null and voyd, and that all other lawes be of force vntill some other course be taken by a Generall Assembly for better provision hearin."<sup>1</sup>

With this enactment the practice of submitting laws to a popular vote seems to have fallen into temporary disuse<sup>2</sup> in Rhode Island. "No mention of the referendum under the second charter has been found," says Dr. Bishop.<sup>3</sup> The initiative, however, seems not to have come within the scope of the statute of 1664. Indeed it is declared by an eminent Rhode Island writer that "the power of the freemen of the town to initiate legislation has never been formally abolished but is only lost through non-use."<sup>4</sup> But in any event the lessons learned in this colonial school of pure democracy were never wholly lost by the people of Rhode Island. Until 1760 the form of a folk-moot for the entire colony was preserved and all the freemen continued to vote at Newport.<sup>5</sup> Near the close of the eighteenth century we shall find Rhode Island alone of all the thirteen commonwealths voting directly upon the adoption of the Federal Constitution. We shall find its people, too, reviving and exercising this ancient prerogative with reference to every proposed constitution offered as a substitute for their venerable charter. And when one was finally adopted, we shall find that it afforded the means of a revival, though limited and partial, of the same practice as regards ordinary legislation.<sup>6</sup> Recent disclosures might require us to consider also whether a complete restoration of that practice might not be best for Rhode Island, and whether the change from popular to so-called representative legislation has been justified by the results. It has been repeatedly emphasized that, though the smallest in area, Rhode Island holds a unique position among the original American Commonwealths by

<sup>1</sup> "Records of the Colony of Rhode Island" (Providence, 1856), II, 27.

<sup>2</sup> "Thus came to an end the Referendum in the Colony of Rhode Island after having been in practice nearly seventeen years. I believe it is not now possible to cite a case where a law was thus proposed and thus defeated; but this fact (in case it is a fact) would not prove the non-existence of such cases. Their existence is beyond question." — "Book Notes" (Providence), May 5, 1894.

<sup>3</sup> "History of Elections in the American Colonies," Columbia University Studies, III, No. 1, p. 12.

<sup>4</sup> Eaton, "The Right to Local Self-Government," *Harvard Law Review*, XIII, 588.

<sup>5</sup> See "Rhode Island Colonial Records" (Providence, 1861), VI, 256, 257, where the act allowing "proxy votes" in the town meetings is set forth.

<sup>6</sup> See *post*, Chap. XXVII.

reason of the instructiveness and fertility of its institutional history. The Nestor of American historians declared:—

"The annals of Rhode Island, if written in the spirit of philosophy, would exhibit the forms of society under a peculiar aspect; had the territory of the state corresponded to the importance and singularity of the principles of its early existence, the world would have been filled with wonder at the phenomena of its history."<sup>1</sup>

So our most philosophical foreign critic<sup>2</sup> of recent days has observed, concerning the same state:—

"It has an area of only 1085 square miles, less than that of the County of Ayr in Scotland. But . . . some touch of that dramatic quality which belongs to the cities of Greece and Italy recurs in this little republic on Narragansett Bay. Unlike in many ways as were the settlers who went forth from England under the Stuarts to the Greeks of two thousand years earlier, some of the questions which troubled both were the same, and bore fruits not wholly dissimilar. Nor are points of likeness wanting to the history of some of the older cantons of Switzerland."

But the characteristics which have called forth these eulogies belong mostly to the period last reviewed and which closed with the granting of the second charter. It was then that the "ideas which have since become national" were born—then that the most conspicuous "points of likeness" to the classical nations and to Switzerland were to be found.

Of contemporary Rhode Island how different is the testimony.<sup>3</sup>

<sup>1</sup> Bancroft, "History of the United States" (23d Ed., Boston, 1870), I, 380, 381. Cf. the same author's "History of the United States" (author's last revision), (New York, 1891), I, 255, where he adds:—

"The excellency of the principles on which it rested its earliest institutions is not diminished by the narrowness of the land in which they were for the first time tested."

This was indeed a favorite theme with Mr. Bancroft. In an address before the New York Historical Society in 1866, he said that "more ideas which have since become national have emanated from the little colony of Rhode Island than from any other." See Johns Hopkins University Studies, IV, 102, 103.

<sup>2</sup> Bryce, "Introduction to Richman's Rhode Island" (New York, 1902), v.

<sup>3</sup> "No general election passes without, in some sections of the state, the purchase of votes by one or both of the great political parties. . . . Many assemblymen occupy the seats they do by means of purchased votes. In a considerable number of our towns bribery is so common and has existed for so many years that the awful nature of the crime has ceased to impress. . . . It is well known that in such towns, when one political party is supplied with a corruption fund and the other is without, the party so provided invariably elects its Assembly ticket."—From Governor Garvin's Special Message, March, 1903. See also an article, "Rhode Island, A State for Sale," *McClure's*, XXIV, 337, by Lincoln Steffens, who declares (p. 253), that Rhode Island has the delegate system with all its evils—"a government controlled by the purchase of twenty



If we are to assume that recent criticisms are colored by partisan bias and accept only the most moderate of them, we must still believe that the delegate system has long since gone to seed in Rhode Island; that the government once so strikingly popular is no longer even "representative," but is in the hands of a small oligarchy that controls the legislature and dictates legislation.<sup>1</sup> Yet the very conditions that appear to have made this result possible — the smallness of area and population — would seem to render easy still the successful workings of that system of popular legislation which is the glory of Rhode Island's colonial era. Critics of the Swiss referendum have maintained that it is adapted only to small communities like Switzerland.<sup>2</sup> But in Rhode Island the population is less than one-sixth as great and is much more homogeneous — substantially one in race and language and without marked differences in religion. Surely if any field would be a favorable one for the continued use of the referendum, it ought to be this. Rhode Island might do worse than to seek a remedy for her widely published evils by applying the lessons of her own glorious past.

### C. Connecticut

#### 1. *The Three River Towns*

The immediate occasion of the settlement of Connecticut was the desire of a portion of the then recent colonists of Massachusetts Bay for a form of government in which the people would be accorded a larger share.<sup>3</sup> The government of the last-named colony was at the time oligarchical in character. The governor and his court of assistants had usurped the law-making function, and so limited was the electorate that "Judge Story approves the estimate that five-sixths of the people were still disfranchised as late as 1676."<sup>4</sup> The inhabit-

country districts which poll less than one-eleventh of the vote of the state." This "pointed to the farmer as the first man to corrupt; and he proved corruptible only because the strain came hardest upon him."

<sup>1</sup> Steffens, *McClure's Magazine*, XXIV, 345.

<sup>2</sup> Cf. Lowell, "The Referendum in Switzerland and in America," *Atlantic Monthly*, LXXIII, 523.

<sup>3</sup> See Address of Rev. Joseph H. Twichell at the Quarto-millennial of the First Constitution of Connecticut (Hartford, 1889); Johnston, "Connecticut, A Study of a Commonwealth Democracy" (Boston and New York, 1887), 17 *et seq.*, 69 *et seq.*; Borgeaud, "The Rise of Democracy in Old and New England" (Hill's Trans., London, 1894), 120.

<sup>4</sup> Johnston, "Connecticut," 66.

ants of some of the newly settled plantations evinced a tendency toward freer conditions, which appears to have brought them into conflict with the older towns. Led by Thomas Hooker, a Puritan minister whose advanced political views have already been noticed in connection with the democratic movement in England, the "new-comers," as they were styled, became so dissatisfied with the existing government that they applied to the General Court for permission to remove and settle on the lower Connecticut River, where they might be free to put their political theories in practice.<sup>1</sup> At first refused, the permission was finally granted on condition that the emigrants would continue under the jurisdiction of Massachusetts Bay,<sup>2</sup> and in the early summer of 1636, New England witnessed the unique spectacle of the migration of the inhabitants of three towns<sup>3</sup> in order that they might enjoy a larger liberty, not in religious but in civil affairs.

Says Alexander Johnston in his suggestive work:<sup>4</sup>—

"The first conscious and deliberate effort on this Continent to establish the democratic principle in control of government was the settlement of Connecticut. . . . The birthplace of American democracy is Hartford."<sup>5</sup>

### *The Fundamental Orders*

Originating under these novel conditions, it is not strange that the new colony found early occasion to adopt the practice of popular legislation. Within three years after the settlement the male inhabitants of the three towns—Windsor, Wetherford, and Hartford—met at the last named in mass convention, formed "one Publike State or Comonwelth," and entered "into Combination and Confederation together . . . in or ciuell Affaires to be guided and gouerned according to such Lawes, Rules, Orders and decrees as shall be made, ordered and decreed."<sup>6</sup> They then proceeded to adopt an instrument, consisting of eleven articles providing, a frame of govern-

<sup>1</sup> Johnston, "Connecticut," 69 *et seq.*

<sup>2</sup> Johnston, "Genesis of a New England State," Johns Hopkins Historical Studies, I, Pt. X, 11.

<sup>3</sup> Johnston, "Connecticut," 24, 25.

<sup>4</sup> "Connecticut, A Study of a Commonwealth Democracy" (Boston and New York, 1887), Preface, viii.

<sup>5</sup> *Id.* 73.

<sup>6</sup> "Colonial Records of Connecticut," 1636-1665 (Trumbull's Ed., Hartford, 1850), 21.

ment for the new federation and guaranteeing its democratic character by directing that the election of magistrates "shall be done by the whole boddy of Freemen."<sup>1</sup> This was the famous instrument known as the "Fundamental Orders"<sup>2</sup> of 1639. It has been styled "the first written constitution, in the modern sense of the term, as a permanent limitation on governmental power, known in history, and certainly the first American constitution of government to embody the democratic idea."<sup>3</sup> It is in this last element rather than in its written form that its interest lies here.

"The common opinion is," says Johnston,<sup>4</sup> "that democracy came into the American system through the compact made in the cabin of the Mayflower, though that instrument was based on no political principle whatever, and began with a formal acknowledgment of the king as the source of all authority. It was the power of the Crown 'by virtue' of which 'equal Laws' were to be enacted, and the 'covenant' was merely a makeshift to meet a temporary emergency; it had not a particle of political significance nor was democracy an impelling force in it."

But the Hartford instrument is most instructive in this connection, not merely in recognizing the people as the seat and source of power, but in exhibiting the people as legislators. The meeting which adopted this instrument was an assembly of the entire body of the freemen.<sup>5</sup> It is "we the Inhabitants and Residents of Windsor, Harteford and Wetherfield" who enact the laws which bear the title of "Fundamental Orders." Each of the eleven articles is introduced by the formula, "It is ordered, sentenced and decreed," *i.e.* by us, the said inhabitants. Twichell, following Leonard Bacon, says:—

"The conventional phrase, 'Be it enacted' as traditionally prefixed to each section of a parliamentary statute, bore originally a meaning of petition; *may* it be enacted, *i.e.* by the sovereign. This phrase those men of Wetherfield, Windsor and Hartford rejected, substituting for it in every instance 'it is ordered, sen-

<sup>1</sup> "Colonial Records of Connecticut," 1636-1665 (Trumbull's Ed., Hartford, 1850), 25.

<sup>2</sup> See Text, Id. 20-25.

<sup>3</sup> Johnston, "Connecticut" (Boston and New York, 1887), 63. See also the same author's "Genesis of a New England State," Johns Hopkins Historical Studies, I, Pt. X, 14; Fiske, "Civil Government," 192; Twichell's Address, 27.

<sup>4</sup> "Connecticut," 63.

<sup>5</sup> See Twichell's Address, 26. He thinks it included "probably above two hundred in number."

That they met as a sovereign electorate and not as a collection of towns is well brought out by Professor Charles McLean Andrews in an article on "The Beginnings of Connecticut Towns," *Annals American Academy of Political and Social Science* (Philadelphia, 1890), I, 178 *et seq.*

tenced and decreed' and they must have done it intelligently, and as signifying that they held their action subject to no review, confirmation or veto by any outside authority."<sup>1</sup>

The document appears to have been drafted in advance for the assembly, "since one brief winter day sufficed to bring it to a conclusion."<sup>2</sup> Tradition and speculation vacillate between ascribing its authorship to Roger Ludlow, a Windsor lawyer, author of the Code of 1650, and to Thomas Hooker, the Puritan preacher and statesman.<sup>3</sup> But whichever may be entitled to the honor, it seems clear that some one performed the office of a convention and framed the instrument which the freemen, in their sovereign capacity, passed upon and approved.<sup>4</sup> The enactment of the Fundamental Orders, therefore, includes the two essential steps of modern constitution-making. Hence, if the Hartford instrument was the first *written*, it was also the first *popularly ratified* American constitution. When the people of New England, a century and a half later, were adopting new constitutions they could look back upon many precedents in popular legislation but none more conspicuous than this first Connecticut instance. The submission of constitutions in the Revolutionary era was not a novel proceeding; it was rather the fruit of ripened political experience, nowhere more strikingly exemplified than in the adoption of the Fundamental Orders of Connecticut.

The practice of popular participation in the making of laws, thus naturally and easily inaugurated in Connecticut, was not abandoned with the adoption of the "Fundamental Orders." It seems to have been recognized from the first that any changes in the instrument should be passed upon by the freemen. An interpretation of it was, indeed, announced by the General Court in 1643; but even this was in the direction of leaving the matter to the people, as the following recital shows:—

"Whereas in the fundamentall Order yt is said (that such who have taken the Oath of fidelity and are admitted inhabitants) shall be allowed as qualified

<sup>1</sup> Twichell's Historical Address at the Celebration of the Two Hundred and Fiftieth Anniversary (Hartford, 1889), 30.

<sup>2</sup> Id. 27.

<sup>3</sup> Id. 43, 46.

<sup>4</sup> "All the people of the colony, or as many as could be present, met at Hartford and adopted the constitution which their leaders had framed." — Andrews, "The Beginning of Connecticut Towns," *Annals American Academy of Political and Social Science* (Philadelphia, 1890), I, 179.

for chuseing of Deputyes, The court declares their judgment, that such only shall be counted admitted inhabitants who are admitted by a generall voate of the major prte of the Towne that receaveth them."<sup>1</sup>

The first article of the orders had fixed the second Thursday in April as the day of election. In 1646 a change was announced as follows:—

"*The Freemen* finding it inconuenient to attend the Court of Election the second Thursday in Aprill haue ordered yt for hereafter to be kept the third Thursday in May, and the Magistrats to hold vntill that day."<sup>2</sup>

Here it is "the freemen" and not merely the general court which orders the change.

Other clauses in the Fundamental Orders restricted the term of all magistrates to one year, and provided "that noe prson be chosen Gouvernor aboue once in two yeares."<sup>3</sup> In 1660, when John Winthrop, Jr., was governor, his service appears to have been so satisfactory that a general desire was expressed for his reëlection.<sup>4</sup> Accordingly the following proceedings in the General Court are reported on April 11, of the year last named:—

"This Court considering the necessity of altering that perticuler in ye 3d<sup>5</sup> Law, respecting the choice of a Gouvernor, vidz: That noe person be chosen Gour. aboue once in two yeares, *haue thought meet to propound it to ye consideration of ye freemen of this collony* and doe order the Secretary to insert the same in the Warrts for ye choice of Deputies, and request the return of ye remote plantas: (yt vse to send Proxies at ye Election by their Deputies. And it is desired that their proxies may be ordered according to what may be concluded on about ye ordr forementioned."<sup>6</sup>

Here we have a complete example of the framing and submission of a constitutional amendment. A little further on the ratification is thus recorded:—

"It was voted by the freemen that ye perticuler in ye 4th Law respecting the choice of the Gouvernor, should be altrd, and that for future there shall be liberty of a free choice yearely, either of ye same person or another, as may be thought meet, without pruidice to ye law, or breach thereof."<sup>7</sup>

<sup>1</sup> "Colonial Records of Connecticut" (Trumbull's Ed., Hartford, 1850), I, 96.

<sup>2</sup> Id. 140.

<sup>3</sup> Id. 21, 22.

<sup>4</sup> See Baldwin, "The Three Constitutions of Connecticut," New Haven Historical Society Papers, V, 182.

<sup>5</sup> This should read 4th. Correction is made in recording the vote.

<sup>6</sup> "Colonial Records of Connecticut" (Trumbull's Ed., Hartford, 1850), I, 346.

<sup>7</sup> Id. 347.

Judge Baldwin says:<sup>1</sup>—

"This early action of the freemen of Connecticut was the origin of the modern referendum rather than, as Borgeaud, in his work on American Constitutions, has it, the Constitution of 1818 itself."

More will need to be said of this hereafter.

## 2. *The New Haven Colony*

The first settlers of New Haven represented a different element of Puritanism from that of the other Connecticut colonists. The former came almost directly from England, stopping a short time only in Boston, and the colony had acquired its organization, its individuality, and its potential characteristics in the mother country. A recent historian of the colony begins his narrative as follows:<sup>2</sup>—

"As the modern English vestry or parish-meeting is the nearest lineal representative of the ancient tun-gemot, so the municipality of New Haven traces its descent from the Parish of St. Stephen, Coleman street, London. That Parish was once the channel for those elements of individual thought and personal influence that have given life and strength to the miniature republic of to-day. In the assemblage of St. Stephen's Parish on the 6th of October, 1624, New Haven's town meeting was a nascent possibility. The parishioners of that church possessed the valuable privilege of choosing their own vicar by popular election. The congregation was large and composed of that middle class wherein lay the vigor and the hope of the Puritan cause. Many of them were traders or wealthy merchants, enemies alike to Spaniards and to Prelatists. On that memorable October day such men met together in parochial conclave, and, of their own free will, by an almost unanimous vote, elected the Rev. John Davenport to be the incumbent at St. Stephen's."

In other words, these colonists, like those of New Plymouth, were familiar with the workings of the democratic principle in their congregational polity long before departing for their new homes. This fact is significant in the light of their later history, for one of their first acts upon arriving at Quinnipiack, which had been selected as the site of the settlement, was an assembly of the free planters and the adoption of

### "*The Plantation Covenant*"

The name of this instrument is thus explained by the first secretary of the colony:—

<sup>1</sup> "Modern Political Institutions" (Boston, 1888), 48.

<sup>2</sup> Levermore, "The Republic of New Haven," Johns Hopkins University Studies (Baltimore, 1886), 5.

"This covenant was called a plantation covenant to distinguish it from a Church covenant, 'wch could nott att thatt time be made, a church nott being then gathered, butt was deferred till a church might be gathered according to God.'"<sup>1</sup>

How clearly does this illustrate the close connection between these church covenants and the crude, popular constitutions of early New England. In this case the church covenant should normally have been adopted first, and would have been had the church been organized. Accidentally the civil constitution took precedence in point of time, but it so much resembled the church covenant that a special name had to be devised in order to distinguish between them. Our knowledge of the character of this "*Plantation Covenant*" is mainly based on a passage in the record of the subsequent year which recites:—

"Whereas, there was a cout. [covenant] solemnly made by the whole assembly of free planters of this plantation the first day of extraordinary humiliation wch we had after wee came together, thatt, as in matters that concerne the gathering and ordering of a church, so likewise in all publique offices wch concerne civill order, as choyce of magistrates and officers, *making and repealing of lawes* deviding allotments of inheritance, and all things of like nature, we would all of us be ordered by those rules wch the scriptures hold forth to us."<sup>2</sup>

"This," says Johnston,<sup>3</sup> "... furnished the lines on which the future constitution was to be constructed. It had, also, peculiar effects which deserve notice, though they may not be apparent on the surface. It practically abolished the excrescences, such as entails and primogeniture, which had grown up on the English Common Law. It was almost, if not quite, a declaration of independence; and it made certain that nothing short of direct and overmastering force could make the commonwealth anything but a republic."

But the clear recognition of the right of the whole people to make their own laws is one of the most significant features of this instrument, important as it was intrinsically as a piece of legislation.

### *The Fundamental Agreement*

"The 4th day of the 4th moneth called June, 1639, all the free planters assembled together in a ge(neral) meetinge to consult about settling ciuill Gouvermnt according to God, and about the nomination of persons thatt might be founde

<sup>1</sup> Levermore, "The Republic of New Haven," Johns Hopkins University Studies (Baltimore, 1886), 13.

<sup>2</sup> Id.

<sup>3</sup> "Connecticut, A Study of a Commonwealth Democracy" (Boston and New York, 1887), 189, 190.

by *consent of all* fittest in all respects for the foundaco(n) worke of a church w(hich) was intend to be gathered in Quinipieck."<sup>1</sup>

This recital opens the formal record of civic life in New Haven. Church and state were not yet differentiated. The assembly, though held in a barn, was opened with prayer, and the pastor, John Davenport, was a prominent figure in its deliberations. Indeed, he performed the work of a draftsman or framer, for he had prepared in advance a series of proposals or "quaeries," which were thereupon submitted to the assembly, and the whole proceeding has the form of a genuine plebiscitum. The record<sup>2</sup> recites that: —

"Mr. Robt. Newman was intreated to write in carracters and to read distinctly and audibly in the hearing of all the people whatt was propounded and accorded on thatt it might appeare that all consented to matters propounded according to words written by him."

The first of these inquiries was: —

"Whether the Scripturs doe holde forth a perfect rule for the directio and gouernmt of all men in all duet(ies) wch they are to performe to God and men as well in the gourmt of famylyes and comonwealths as in matters of the chur."<sup>3</sup>

In passing on this question the assembly appears to have applied the Calvinistic doctrine of "common assent" in its extremest form, for the record reads: —

"This was assented vnto by all, no man dissenting, as was expressed by holding up of hands. Afterwards itt was read our to them thatt they might see in whatt words their vote was expressed: They againe expressed their consent thereto by holdeing up their hands, no man dissenting."<sup>4</sup>

This same method was followed with each of the series which was voted on separately. The second plebiscite related to the "Plantation Covenant" already discussed and "Demanded whether all the free planters doe hold themselves bound by that covenant." This was not only confirmed by the double show of hands, but some who had not been present when the covenant was originally adopted now expressed their formal assent.<sup>5</sup>

By the third proposal

<sup>1</sup> "New Haven Colonial Records," 1636-1649, edited by Hoadley (Hartford, 1857), 11.

<sup>2</sup> Id. 11, 12.

<sup>3</sup> Id. 12.

<sup>4</sup> Id.

<sup>5</sup> Id. 13.



"Those who have desired to be receiued as free planters, and are settled in the plantatio with a purp(ose) resolutio and desire thatt they may be admitted into chur. fellow according to Christ as soone (as) God shall fitt them there-vnto; were desired to express itt by holdeing vp of hands."<sup>1</sup> —

This shows that the assembly was sitting as an ecclesiastical<sup>2</sup> not less than as a civil body, and led up naturally to the fifth<sup>3</sup> quaery, which was: —

"Whether Free Burgesses shalbe chosen out of chur. members they thatt are in the foundat(ion) worke of the church being actually free burgesses, and to chuse to themselues out of the li(ke) estate of church fellowp and the power of chuseing magistrates and officers from among themselues and the power off making and repealing lawes according to the worde, and the deviding of inheritances and decideing of differences thatt may arise, and all the buisnesses of like nature are to be transacted by those free burgesses."<sup>4</sup>

The submission of this proposal occasioned apparently the first real debate of the session. After the usual second vote had been taken "one man," supposed to have been Rev. Samuel Eaton,<sup>5</sup> arose and expressed his dissent. He was not opposed to the religious qualification: "Onely at this he stuck, thatt free planters ought nott to giue this power out of their hands."<sup>6</sup>

Here we find an early champion of direct popular participation in law-making as opposed to the delegation of legislative power. With foresight and discernment far in advance of his time this Puritan minister of the early seventeenth century seems to have realized that his fellow-colonists enjoyed a valuable and inherent privilege

<sup>1</sup> "New Haven Colonial Records," 1636-1649, edited by Hoadley (Hartford, 1857), 13.

<sup>2</sup> "The first leaders of the colony of New Haven represent the clerical tendencies of Congregationalism. The government organized by them was an absolute theocracy." — Borgeaud, "Rise of Democracy in Old and New England" (London, 1894), 134, 135.

<sup>3</sup> In the fourth, "All the free planters were called vpo to expresse whether they held themselues bound to esta(blish) such ciuill order as might best conduce to the secureing of the pureity and peace of the ordina(nces) to themselues and their pastoreity according to God." — "New Haven Colonial Records" (Hartford, 1857), 13, 14.

<sup>4</sup> Id.

<sup>5</sup> Atwater, "History of the Colony of New Haven" (New Haven, 1881), 99, note. "Mr. Samuel Eaton stood up to vindicate in that barn his kinship with Hampden and Vane in Parliamentary Halls, and to display a dim sense of the greater liberties toward which greater Englishmen were struggling." — Levermore, "The Republic of New Haven," Johns Hopkins University Studies (Baltimore, 1886), 19.

<sup>6</sup> "New Haven Colonial Records" (Hartford, 1857), 14.

which it was a mistake so lightly to surrender. He urged at least "thatt all the free planters ought to resume this power into their owne hands againe if things were nott orderly carried."<sup>1</sup> But his plea was unavailing. After some further discussion a third vote was taken with the same result as before. "The free planters of Quinni-piack had voluntarily renounced their sovereign rights and transformed their democracy into an aristocracy."<sup>2</sup>

In the course of the debate over Mr. Eaton's proposal a supporter of the sixth "quaere" as submitted referred to the London companies or guilds which "chuse the livereyes by whom the publique magistrates are chosen."<sup>3</sup>

"This," says Levermore,<sup>4</sup> "was likely to be a convincing illustration to his audience of London merchants." There are other evidences, too, that the customs and practices of the ancient guilds were before the minds of the New Haven colonists as a model. The record of this interesting and historic meeting closes with the following recital:—

"Whereas there was a fundamentall agreeemt made in a generall meeting of all the free planters of this towne, on the 4th of the fowerth moneth called June, namely that, church members onely shall be free burgesses, and they onely shall chuse among them selues magistrates and officers to ha(ve) the power of transacting all publique ciuill affayres of this plantatio, of makeing and repeali[ng] lawes, deuideing inheritances, decideing of differences thatt may arise, and doeing all things and businesses of like nature. Itt was therefore ordered by all the said free planters thatt all those thatt hereafter should be receiued as planters into this plantatio should also submitt to said fundamentall agreeemt and testifie the same by subscribeing their names vnder the names of the aforesaid planters as followeth."<sup>5</sup>

Here, it will be seen, was the identical requirement which the guilds made that newly admitted members must subscribe to the regulations of the guild, as well as that employed in the making of church covenants. The founders of the New Haven Colony were commonwealth builders for the future, but using old world materials.

<sup>1</sup> "New Haven Colonial Records" (Hartford, 1857), 14.

<sup>2</sup> Levermore, "The Republic of New Haven," Johns Hopkins University Studies (Baltimore, 1886), 18.

<sup>3</sup> "New Haven Colonial Records" (Hartford, 1857), 14.

<sup>4</sup> "The Republic of New Haven," Johns Hopkins University Studies (Baltimore, 1886), 19.

<sup>5</sup> "New Haven Colonial Records" (Hartford, 1857), 17.

### 3. *The Guilford Colony*

The history of one other Connecticut town deserves brief mention as illustrating the development of the covenant idea. In the same year, 1639, when the inhabitants of New Haven and the three river towns were framing their historic documents, the colonists who afterward settled Guilford subscribed, while at sea and before reaching America, the following:—

"June 1. Individuals who, the next September, purchase Menunkatuck, afterwards Guilford, enter into the following covenant: 'We whose names are hereunder written, intending by God's gracious permission to plant ourselves in New England, and, if it may be, in the southerly part about Quinnipiack, we do faithfully promise each to each, for ourselves and our families, and those that belong to us, that we will, the Lord assisting us, sit down and join ourselves together in one entire plantation, and to be helpful each to the other in any common work, according to every man's ability, and as need shall require; . . . As for our gathering together in a church way, and the choice of officers and members to be joined together in that way, we do refer ourselves until such time as it shall please God to settle us in our plantation.'" <sup>1</sup>

In this instrument we mark a transitional stage between the church covenant and the town compact. It combines features of both, and while those of the former predominate, the document is clearly preparatory to the complete application of the covenant idea in the government of the new colony. Comparing its history with that of the others above reviewed, we may well believe with Professor Andrews <sup>2</sup> "that the Connecticut constitution was a growth, as much as the Federal constitution, and that its roots run far back into the history of England as well as of Massachusetts Bay."

### D. *New Hampshire*

There was one other New England colony which formed part of the original thirteen. The principle of popular legislation found lodgment in New Hampshire, though less perfectly than in some of its neighbors. In 1639, the year, it will be remembered, of the adoption of the "Fundamental Orders" in Connecticut, the colonists of Exeter, in what was afterward known as New Hampshire, met and adopted what they termed "The Combination," and which like

<sup>1</sup> Felt, "Ecclesiastical History of New England," I, 406, 407.

<sup>2</sup> "The Beginning of the Connecticut Towns," *Annals American Academy of Political and Social Science*, I, 190.

those of the other colonies was really a constitution. They recite that—

"We . . . loyall subjects" of the king, "brethern of the Church at Exeter . . . combine ourselves together to erect and set up amongst us such a government as shall be to our best discerning, agreeable to the will of God."<sup>1</sup>

They agree —

"to submit ourselves to such godly and christian laws as are established in the Realme of England to our best knowledge & to all other laws wh shall, upon good grounds be made & inacted amongst us."<sup>2</sup>

It is significant that this instrument was drafted in advance like the "Fundamental Orders," and submitted to the assembly for approval and adoption. In this, as in the other town democracies of New England, laws were made by the entire body of freemen, though here they were subject to the approval of the chief officer of the colony who was called the "Ruler," but who was chosen by popular vote.<sup>3</sup>

Dover was another New Hampshire town where popular legislation was in vogue. Its inhabitants in 1640 "agreed to submit themselves to the laws of England and to such others as should be enacted by a majority of their number until the royal pleasure should be known."<sup>4</sup>

### *E. The New England Town Meeting*

But it may be objected that this array of instances of popular legislation and compact-making belongs to a period considerably antedating that of the first state constitutions, and that no actual connection is established between the latter and the former. The objection would not be weighty if true. Object lessons like these are not lost in two or three generations, and it is natural for a people to turn back to them in times of emergency when precedents are needed. But the truth is, popular legislation did not cease with this early period. While the central government became "representative" in character, local institutions retained the feature of direct popular participation and the democratic customs of early New England were continued, up to the revolution and after, through the town meeting.

It would not be profitable here to discuss the mooted question as

<sup>1</sup> *New Hampshire Provincial Papers*, I, 132, where it is printed in full.

<sup>2</sup> Id.

<sup>3</sup> Bell, "History of Exeter," 18.

<sup>4</sup> *Harvard Law Review*, XIV, 137.

to how far this interesting institution is a transplantation from the older world, and how far a native product of the soil. It may be assumed, on the one hand, that it reproduced many features of the moot or popular assembly of the old Germanic mark and Saxon tun.<sup>1</sup> But to these were certainly added the characteristics of a Puritan congregational assembly. Just as the town was, in many instances, the transplantation of a Puritan church,<sup>2</sup> so the town meeting was at first little more than the assembled congregation. In one of the earliest of these meetings at Salem, in 1629, a pastor and a teacher of the congregation were selected by written ballot<sup>3</sup> while a subsequent assembly of the same sort chose the neatherd to tend the cattle on the common pasture land.<sup>4</sup> Thus the town meeting was a part of the Puritan movement — a link in the long chain of development from Calvinism.<sup>5</sup> But Calvinism itself had appropriated the fruits of Swiss democracy. Ultimately, after all, we reach, through either source, the Teutonic folkmoot.

But if the town meeting was cast in an ecclesiastical mould, its business was largely of a secular character. Here were levied the taxes for all purposes,<sup>6</sup> — the maintenance of the church, including the salary of the pastor and the repair of the "meeting-house," the support of the schools, the relief of the poor, bounties for the destruction of wild animals, etc. In this feature the town meeting, participated in by all, was doing the work of a modern municipal council or county board. Here, especially in its early history, were determined all questions relating to the use and disposition of the

<sup>1</sup> See Adams, "The Germanic Origin of New England Towns," Johns Hopkins University Studies (Baltimore, 1882), I, 45; Channing, "Town and County Government in the English Colonies of North America," *Id.* II, 437.

<sup>2</sup> See 69, 71, 93, *ante*. "The New England township was an accidental grouping of as many church members as could reside within reach of one meeting house." — *The Nation*, XLIX, 277.

"Church and town were one." — Adams, "Three Episodes of Massachusetts History" (Boston, 1892), II, 648.

<sup>3</sup> Mowry, "Influence of John Calvin on the New England Town Meeting," *New England Magazine* (new ser.), II, 107. This is also interesting as the first instance of the use of the written ballot in America. See Papers American Historical Association (New York, 1891), V, 178, 185.

<sup>4</sup> Mowry, 108.

<sup>5</sup> *Id.*

<sup>6</sup> Howard, "Local Constitutional History" (Baltimore, 1889), 64, 65; Foster, "Town Government in Rhode Island," Johns Hopkins University Studies (Baltimore, 1886), IV, 87.



common lands and the care of the town herd,<sup>1</sup> the survey of boundaries, and erection of fences. Here, also, were regulated such important matters of local administration as the establishment of roads and ways,<sup>2</sup> and the support of the poor and insane.<sup>3</sup> In Rhode Island the town meeting was also a judicial body,<sup>4</sup> trying offenders, effecting partition of land, and determining matters of probate.<sup>5</sup>

The town meeting was likewise the school district meeting. It not only fixed the rate for maintaining the school, but in some instances it chose the schoolmaster.<sup>6</sup> In others it appointed "wardens" or overseers for this purpose, but in such a case it took care to apply the Calvinistic doctrine of "common assent" by providing that the chosen one was "not to be admitted into the place of Schoolem. without the Generall cōsent of the Inhabitants or the maior p'te of them."<sup>7</sup> The town meeting fixed the period and even the hours of keeping school,<sup>8</sup> the subjects of instruction,<sup>9</sup> and the mode of discipline.<sup>10</sup>

"Nothing connected with the civil or religious life of the community," it has been remarked,<sup>11</sup> "seems to have been too minute to escape the attention of the town meeting." Regulations concerning the treatment of dogs,<sup>12</sup> the construction of church pews, and the seating of the congregation on Sundays<sup>13</sup> are interspersed with measures of the most far-reaching importance and historic interest.

Finally, the town meeting was "an electoral and directing assembly."<sup>14</sup> Here were chosen all the officers, town and colonial, including "deputies" to the general court. And these latter "were

<sup>1</sup> Howard, "Local Constitutional History," 93; Adams, "Three Episodes of Massachusetts History" (Boston, 1892), II, 821, 823.

<sup>2</sup> Howard, "Local Constitutional History," 207.

<sup>3</sup> Adams, "Three Episodes of Massachusetts History," II, Chap. VIII. The provisions for this purpose appear to have been very meagre.

<sup>4</sup> Thus preserving or reviving the functions of the Saxon shiremoot.

<sup>5</sup> Durfee, "Gleanings from the Judicial History of Rhode Island" (Historical Tracts, No. 18).

<sup>6</sup> Dorchester Town Records, 136-137.

<sup>7</sup> Id. 54-56.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Howard, "Local Constitutional History" (Baltimore, 1889), 72.

<sup>12</sup> See an amusing excerpt from the Ipswich records in Professor Hart's "Colonial Town Meeting," "Practical Essays on Government" (New York, 1893), 44.

<sup>13</sup> "Worcester Town Records" (1740-1753), 98, 100; id. (1753-1783), 201, 206. An account of similar regulations at Braintree is given by Adams, "Three Episodes of Massachusetts History" (Boston, 1892), II, 823.

<sup>14</sup> Hart, "Practical Essays on Government," 134.

in actual fact delegates rather than representatives.”<sup>1</sup> In the meetings at which they were chosen the important questions likely to come before the legislators were discussed, and the deputy was often instructed by vote or committee as to what his attitude should be.<sup>2</sup> “The celebrated ‘instructions’ of this assembly [the Boston town meeting in 1764] led to the Congress of 1765.”<sup>3</sup> In the course of time the delegates even sought instructions from the towns, and we shall find instances<sup>4</sup> of great delegate bodies adjourning in order that their members might go back to the town meetings to “take the sense” of the people. From such a custom it was but a step to the practice of submitting formal propositions to the town meetings for their approval or rejection. This step was taken when the New England states framed their first constitutions. The town meeting kept alive popular familiarity with legislation, established the doctrine that the people were the source of authority,<sup>5</sup> and educated the voters of New England up to a point where the transition to popular constitution-making was so natural and easy as to be almost inevitable.

### *Comparison with Other Colonies*

When we turn to the American colonies outside of New England we find in most of them a condition, as regards local institutions, in marked contrast with that just described. In none of the southern colonies was there a town meeting in the New England sense. In

<sup>1</sup> Mowry, “The Influence of John Calvin on the New England Town-Meeting,” *New England Magazine* (new ser.) II, 101.

<sup>2</sup> Id. Cf. Hart, “Practical Essays on Government,” 144, 145; *Referendum News*, I, 24.

<sup>3</sup> Howard, “Local Constitutional History,” 74. Cf. *Referendum News*, I, 24.

<sup>4</sup> Notably the conventions in New Hampshire and Rhode Island called to ratify the Federal Constitution.

The machinery of the town meeting was also employed in the submission of proposed constitutions and amendments, as in the organization of the new state of Maine and in the amendment clause (Art. XI) of the Connecticut constitution.

<sup>5</sup> “The independence of the township was the nucleus round which the local interests, passions, rights, and duties collected and clung. It gave scope to the activity of real political life, thoroughly democratic and republican. The colonies still recognized the supremacy of the mother country; monarchy was still the law of the state; but the republic was already established in every township. . . . The American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships and took possession of the state. Every class was enlisted in its cause; battles were fought and victories obtained for it; it became the law of laws.” — De Tocqueville, “Democracy in America,” I, 50, 70.

Maryland<sup>1</sup> and Virginia<sup>2</sup> what were called "towns" were of late development, never became democratic institutions, and their officers were not even elective. It is true that in both of these colonies as well as in the Carolinas<sup>3</sup> there was a parish meeting. But the parish "was employed chiefly as an ecclesiastical organization,"<sup>4</sup> and even its vestries were sometimes appointed.<sup>5</sup> The parish meeting, too, reversed the conditions existing in the New England town meeting. For while the business of the former was mainly ecclesiastical, that of the latter, though it was connected in origin with the church, was, as we have seen, mainly secular. Moreover, the parish meeting of the South was the meeting of a single sect, and that not always the dominant one. In New England, as practically all affiliated with the one church, the ecclesiastical no less than the secular business of the town meeting was participated in by the whole body of freemen.

There seem to have been but two colonies outside of New England where an institution with even the semblance of the town meeting might be found. In New York, after two generations of highly centralized and autocratic Dutch rule,<sup>6</sup> a statute was passed in the English provincial period, probably suggested by the neighboring New England institution, authorizing freeholders of the towns to hold meetings for making "prudential orders and rules" relating to "improvements of tillage and pasturage."<sup>7</sup> For some years the towns had existed for election purposes, and certain local officers common to the New England system had been chosen by the freeholders.<sup>8</sup>

<sup>1</sup> "The entire local machinery consisted of five or seven commissioners holding office during good behaviour and as a close corporation appointing new members to fill vacancies in the board." — Wilhelm, "Local Institutions of Maryland," Johns Hopkins University Studies, III, 408.

<sup>2</sup> Ingle, "Local Institutions of Virginia," Johns Hopkins University Studies, III, 216, 217.

<sup>3</sup> Howard, "Local Constitutional History," 118, 127 *et seq.*

<sup>4</sup> *Id.* 126.

<sup>5</sup> *Id.* 118; Ingle, "Local Institutions of Virginia," Johns Hopkins University Studies, III, 168.

<sup>6</sup> No provision was made in the charters granted to the Dutch towns for the direct action of the people in town affairs. There is no recognition of the town meeting as a local political organization, but all ordinances even of a local nature must receive the approval of the director and council after they have been passed by the local court. — Elting, "Dutch Village Communities on the Hudson River," Johns Hopkins University Studies, IV, 5.

<sup>7</sup> Act of 1691; Van Schaak, "Laws of New York," I, 2, 3.

<sup>8</sup> Howard, "Local Constitutional History," 110.



Likewise in Pennsylvania there were early instances of town meetings, though few in number and held at long intervals.<sup>1</sup> And it was hardly a coincidence that, as we shall find when we reach the Revolutionary era, the two states last named were among the few outside of New England where there was even a demand by any considerable number for the submission of their first constitutions to the people.

"In our national history," says Professor Howard,<sup>2</sup> "the town meeting fills a glorious page." It has indeed been a favorite subject of eulogy by the institutional historians from De Tocqueville's day until our own. It has been declared the cradle of colonial union and the nursery of nationality<sup>3</sup> as well as "the germ which contains the whole of social life, and from which grow the other forms of political development."<sup>4</sup> But not the least of its important social functions was that of a school of popular legislation, preserving the traditions of primitive New England and even of the Teutonic folkmoets, and preparing the people to resume their ancient practice of passing upon their fundamental laws when some great occasion should render it timely. That occasion came amid the throes of the American revolution.

<sup>1</sup> Smith, "History of Delaware County," 188; Holcomb, "Pennsylvania Boroughs," 4; Johns Hopkins University Studies, IV, 164-166.

<sup>2</sup> "Local Constitutional History," 74.

<sup>3</sup> Id.

<sup>4</sup> Scott, "The Development of Constitutional Liberty" (New York, 1890), 175.

## CHAPTER VIII

### POPULAR RATIFICATION IN COLONIAL AMERICA (*Continued*)

#### THE MIDDLE AND SOUTHERN COLONIES

##### *A. The Scotch-Irish*

WE have seen how the Scotch colonized Ulster in the seventeenth century.<sup>1</sup> By the following century the English government had inaugurated a policy which caused a second emigration. A "Test Act"<sup>2</sup> was passed which disqualified Presbyterians from holding office, an "act against schism,"<sup>3</sup> which rendered Presbyterian schoolmasters liable to imprisonment; while various other persecutions were imposed with the design of supplanting Presbyterianism with the Church of England.<sup>4</sup> The Scotch-Irish were thus in much the same position as the Puritan Separatists had been a century before. We shall find that their course of action was parallel. "They left the land which had been saved to England by the swords of their fathers," observes Hanna,<sup>5</sup> "and crossed the sea to escape from the galling tyranny of the bishops whom England had made rulers of that land." We shall find also a striking similarity between the

<sup>1</sup> *Ante*, 62, 63.

<sup>2</sup> This was a clause of the "Repression of Popery Act" passed by the Irish Parliament and sent to England for final revision. "The taking the sacrament, according to the rites of the Established Church, was made a condition of holding any office, civil or military, under the Crown, above the rank of a constable. The exclusive privileges so long desired by the Irish Bishops were thrown into their hands as a make-weight in a bill of a totally opposite tendency. The Presbyterians, the Independents, the Huguenot immigrants, the Quakers, not protected in their public worship, like the English Dissenter, by a Toleration Act, were swept under the same political disabilities and were at once cut off from the army, the militia, the civil service, the commission of the peace, and from seats in the municipal corporations." — Froude, "The English in Ireland" (New York, 1875), I, 313.

<sup>3</sup> 13 English Statutes at Large, 70 (1714).

<sup>4</sup> Hanna, "The Scotch-Irish" (New York, 1902), I, Chap. XXXIX.

<sup>5</sup> *Id.* 621, 622.

results which followed the Puritan and the Scotch-Irish migrations.

Besides religious persecutions there were laws which crippled the industries<sup>1</sup> built up by these colonists in Ireland, and oppressive measures on the part of their landlords.<sup>2</sup> Hence the eighteenth century saw large numbers of these sturdy folk transferred to the new world.<sup>3</sup> They came in two main streams, one leading to Philadelphia, whence they scattered through the western portion of Pennsylvania and Virginia, and the other to Charleston, whence they proceeded to settle in the mountainous districts of the Carolinas.<sup>4</sup>

There were, indeed, large numbers of Scotch-Irish immigrants in other colonies, but their most extensive settlements were in the regions named, and there they formed a distinct and predominating type.

"The two facts of most importance to remember in dealing with our pioneer history," says Roosevelt,<sup>5</sup> "are, first, that the western portions of Virginia and the Carolinas were peopled by an entirely different stock from that which had long existed in the tide-water regions of those colonies; and, secondly, that, except for those in the Carolinas who came from Charleston, the emigrants of this stock were mostly from the north, from their great breeding-ground and nursery in western Pennsylvania."

Other nationalities were, of course, represented among these mountaineers of the southwest. But, as Professor Turner says,<sup>6</sup>

<sup>1</sup> Hanna, "The Scotch-Irish" (New York, 1902), I, Chap. XXXIX, 614, 622.

<sup>2</sup> Arthur Young, however, says: "The spirit of emigrating in Ireland appeared to be confined to two circumstances: the Presbyterian religion and the linen manufacture. . . . As to emigration in the North, it was an error in England to suppose it a novelty which arose with the increase of rents." — "Tour in Ireland" (1780).

<sup>3</sup> "And now recommenced the Protestant emigration, which robbed Ireland of the bravest defenders of English interests, and peopled the American seaboard with fresh flights of Puritans. Twenty thousand left Ulster on the destruction of the woollen trade. Many more were driven away by the first passing of the Test Act. The stream had slackened, in the hope that the law would be altered. When the prospect was finally closed, men of spirit and energy refused to remain in a country where they were held unfit to receive the rights of citizens; and thenceforward, until the spell of tyranny was broken in 1782, annual ship-loads of families poured themselves out from Belfast and Londonderry." — Froude, "The English in Ireland," I, 392.

<sup>4</sup> Roosevelt, "Winning of the West" (New York, 1889), I, 104-105.

Mr. Hanna gives an interesting chart showing the location of these settlements. "The Scotch-Irish," I, prefix:

<sup>5</sup> "Winning of the West," I, 105.

<sup>6</sup> "Western State-making in the Revolutionary Era," *American Historical Review*, I, 72, 73.

"Under a milder sky and a less drastic government, the expatriated Scots lost nothing of their individuality. Masterful and independent from the beginning, masterful and independent they remained, inflexible of purpose, impatient of injustice,

"The Scotch-Irish element was ascendant, and this contentious, self-reliant, hardy, backwoods stock, with its rude and vigorous forest life, gave the tone to western thought in the Revolutionary era." Hence it was also that Presbyterian Calvinism<sup>1</sup> became the prevailing creed of this southwestern region. Even settlers of alien race, but also Calvinists, like the Huguenots,<sup>2</sup> found it easy to identify themselves with Presbyterianism. Wherever these Scotch-Irish immigrants went, they bore memories of the Covenant and the oppressions of the English crown. Let us follow their history as they carry with them and develop these ancestral ideas.

### *B. Pennsylvania*

The founder of the Keystone commonwealth was not a Puritan, but he imbibed many of the ideas of that sect,<sup>3</sup> and paved the way for their adoption in his colony. We have seen<sup>4</sup> how elaborately he worked out the Calvinistic doctrine of "common consent," giving it an historical basis as applied to civil affairs. Of the constitution which, under the name of "Concessions and Agreements," he framed in 1676 for the colony of West Jersey, Penn said:—

and staunch to their ideals. Something perhaps they owed to contact with the Celt. Wherever the Ulster folk have made their home, the breath of the wholesome north has followed them, preserving untainted their hereditary virtues." — Henderson, "Stonewall Jackson and the American Civil War," 3.

<sup>1</sup> "Of all the then prominent faiths Calvinism was nearest to their [the settlers] feelings and ways of thought. Of the great recognized creeds it was the most republican in its tendencies, and so the best suited to the backwoodsmen." — Roosevelt, "Winning of the West," II, 233.

<sup>2</sup> A type of these was John Sevier, one of the great figures in the history of the region whose constitutional development we are about to consider.

<sup>3</sup> His early youth was passed in Essex, a region "intensely Puritan, and this seems to have had an important influence on the future Quaker leader. It no doubt modified his inherited royalist opinions, and it is not unlikely that during those twelve years he unconsciously received from his surroundings that tinge of thought which led to Quakerism. . . . The Puritan state of mind was a natural foundation for Quakerism." — Fisher, "The True William Penn," 59, 60.

"The young exile turned aside to the college at Saumur, where, under the guidance of the gifted and benevolent Amyrault, his mind was trained in the severities of Calvinism, as tempered by the spirit of universal love." — Bancroft, "History of the United States," II, 369.

At Oxford he sympathized actively with those who resisted the attempts to overthrow Puritanism in the University at the restoration. See "Encyclopædia Britannica," XVIII, 492; Clarkson, "Memoirs of the Private and Public Life of William Penn," I, 11.

<sup>4</sup> *Ibid.*, 2, note.

"There we lay a foundation for after ages to understand their liberty as men and Christians, that they may not be brought in bondage but by their own consent; for we put the power in the people."<sup>1</sup>

When he came to draft a constitution for the Pennsylvania colony, Penn consulted with the Puritan and Republican Algernon Sidney, and, like John Adams a century later, he drew many of his ideas from Harrington's *Oceana*. The instrument thus prepared in London shortly before Penn's departure for the new colony was one of the most advanced of its class, and in no respect more so than in its evident purpose to "put the power in the people." It provided<sup>2</sup> that for the first year the general assembly should consist of all the freemen of the province. Even after the representative assembly had been established no law changing the fundamental instrument could be passed without the consent of the governor *and six-sevenths of the freemen*. The clear recognition thus afforded to the principle of popular ratification was supplemented, soon after Penn's arrival, by the meeting of the assembly which adopted the "Great Law of Pennsylvania."

This Quaker colony, with its enlightened policy of toleration toward all sects, offered peculiar attractions to the refugees from North Ireland.<sup>3</sup> The first presbytery in the New World was organized mainly by Scotch-Irish missionaries as early as 1706 at Philadelphia,<sup>4</sup> and from that port these hardy champions of Presbyterianism penetrated into the newer counties,<sup>5</sup> dispersing ultimately throughout the whole colony.<sup>6</sup> Wherever they went in any considerable number, they soon founded a church and then a presbytery,<sup>7</sup> and events were

<sup>1</sup> "Encyclopædia Britannica," XVIII, 504.

<sup>2</sup> Its text is found in MacDonald's "Select Charters," 192.

<sup>3</sup> "The larger part of the Scotch-Irish migration to America appears to have come to Pennsylvania, attracted probably by the fame of this colony for religious liberty and fertile soil." — Fisher, "The Making of Pennsylvania" (Philadelphia, 1896), 163.

"The great majority of the Ulster immigrants to America first landed on the Delaware (river) shore." — Hanna, "The Scotch-Irish," II, 60.

<sup>4</sup> Briggs, "American Presbyterianism" (New York, 1885), 140.

<sup>5</sup> They were, e.g. "the first settlers within the limits of the present Northampton County" (north of Philadelphia). — Egle, "History of Pennsylvania" (2d Ed., Philadelphia, 1880), 968.

<sup>6</sup> Fisher, "The Making of Pennsylvania," 163.

<sup>7</sup> See the formidable list of churches and presbyteries in Hanna, II, 102 *et seq.*

"Wherever the smoke of a score or two of scattered cabins could be seen rising above the primeval forest, in the midst thereof were to be found a schoolhouse and a church." — Cooper, "The Scotch-Irish in the Cumberland Valley," *Proceedings Eighth Congress, Scotch-Irish Society of America*, 1896 (Nashville, 1897), 295.

not slow in demonstrating how strong was the hold of the covenant idea.

In 1743 came the centennial anniversary of the signing of that instrument which, under such dramatic circumstances, had bound their ancestors together. On November 11 of that year, an assembly of Scotch-Irish settlers in Lancaster County, under the leadership of Rev. Alexander Craighead, actually *renewed the covenant*, adopted a series of articles which they styled a "Declaration,"<sup>1</sup> and, "with uplifted swords," abjured their allegiance to the British king, — Hanoverian ruler as well as Stuart pretender, — declaring that "we likewise join our testimony against all that shall succeed them under these limitations to the crown." The grievances recited are mainly of a religious character, — "the overturning and razing out of that glorious work of the reformation," — but it is significant that their protest takes the form of a covenant (as well as a renewal of the Solemn League and Covenant), and in tone and language it is strangely similar to the more famous "Declaration" put forth at Philadelphia a third of a century later.

If the complete records of this formative period of Scotch-Irish colonization in Pennsylvania could have been preserved, they would probably reveal many instances of the application of the covenant idea to new conditions. But unfortunately the value of such materials has too rarely been recognized by contemporaries.

### *Compacts and Associations*

When we reach the Revolutionary period, we find the idea reappearing in the form of military compacts and associations, recalling in a remarkable degree those of the East Anglian Puritans in the preceding century.<sup>2</sup>

"No sooner was the collision between the king's troops and the Massachusetts minute-men known," says Ford,<sup>3</sup> "than voluntary military 'associations' were formed throughout Pennsylvania."

<sup>1</sup> Part of its text is printed in Hanna, II, 41.

<sup>2</sup> *Ante*, Chap. VI.

<sup>3</sup> "Pennsylvania's First Constitution," *Political Science Quarterly*, X, 434. Some of the Tories joined on the ground of expediency. *Id.* "This day a number of the associators of the militia met in each of the wards of the city, to form themselves into suitable companies, and to chose [*sic*] their respective officers." — *Diary of Christopher Marshall*, May 1, 1775, p. 22; Ford, 434.

Indeed, so marked a feature of the revolutionary movement did this become that its promoters were commonly known as "Associators."<sup>1</sup> We shall see later that the Pennsylvania colonists most active in the revolutionary cause, were, significantly enough, the Scotch-Irish.

One of the compacts framed and subscribed by the settlers of this race in Fermanagh Township in Juniata (then Cumberland) County, has been preserved. These settlers had established themselves in their new township and founded their church about 1760, and now, finding it necessary to organize for protection against the Indians, who were then, doubtless by reason of British activity, unusually threatening, adopted the following compact:<sup>2</sup>—

"Terms proposed to the freemen of this company for granting some assistance to our frontier, as follows— viz: that four men be raised immediately and paid by this company in grain or other value thereof at three pounds old way per month during the time they shall be in actual service and also provisions. The time they shall engage to serve is one month, and the method for raising the men aforesaid shall be by levying a proportionate tax on all and singular, the taxable property of each person residing within the bounds of Capt. Minter's company; and if any person shall so far forget his duty as to refuse complying with his brethren in the aforesaid necessary proposals, he shall be deemed a enemy of his country, and be debarred from the privileges of a subject of this state, by being excluded from the benefit of all tradesmen working for him such as millers, smiths and such like.

"We the subscribers do approve of the above proposals and bind ourselves by these presents to the performance of and compliance with the same.

"In witness whereof we have hereunto set our hands on this 21st day of May, 1780."

Signed to the foregoing are about sixty names, apparently nearly all Scotch-Irish, and probably including the whole body of settlers. Even so commonplace a detail as the enlistment seems to have taken the covenant form, for subjoined to the above is the following with some of the same signatures:—

"An agreement made by the under named persons— Viz: that they will serve as militia volunteers along the frontiers for the space of one month, commencing from Monday the 29th instant, to meet at David Nelson's on said day and to march from thence.

"Given under our hands this 24th day of May, 1780."<sup>3</sup>

<sup>1</sup> Ford, *Political Science Quarterly*, X, 434, 435, 452.

<sup>2</sup> See McMeen, "The Scotch-Irish of the Juniata Valley," *Proceedings Eighth Congress, Scotch-Irish Society of America*, 1896 (Nashville, 1897), 122. This author mentions other such agreements.

<sup>3</sup> Id.

The Scotch-Irish were not the dominant race, either politically or numerically, in colonial Pennsylvania. In point of numbers they were exceeded by the Germans, and in the affairs of state the English Quaker element was in control during almost the entire colonial period. But there is reason for believing that the Scotch-Irish colonists exerted an influence, far out of proportion to their numbers or station, upon the political and constitutional development of the keystone commonwealth. The number of public men, prominent in its history, of Scotch-Irish descent, has been a subject of frequent remark. Not so much has been said as to the institutional contributions of the race. Yet, surely it is not without significance that Pennsylvania was the only colony, outside of and not contiguous to, New England, where the town meeting — that lay offshoot of the Calvinistic congregation<sup>1</sup> — was found. Nor can it be regarded as accidental that this state alone, as we shall see, of all those outside of New England, actually provided for submitting to a vote of the people a state constitution of the eighteenth century.

### C. *The Carolinas*

The region known as the province of Carolina received a lesson in the covenant idea very early in its history. After having had several royal charters, the Colony, in 1669, came under the rule of the celebrated "Fundamental Constitutions" which had been framed by John Locke. The government therein provided was proprietary and even feudal in character. But Locke was the son of a Puritan and had been trained in the Calvinistic school of political thought,<sup>2</sup> and the effects of it are clearly traceable in the following clauses:—

"A true copy of these fundamental constitutions shall be kept in a great book by the register of every precinct, to be subscribed before the said register. Nor shall any person, of what degree or condition soever, above seventeen years old, have any estate or possession in Carolina, or protection or benefit of the law there, who hath not, before a precinct register, subscribed these fundamental constitutions in this form:—"

... "Whatsoever alien shall in this form, before any precinct register, subscribe these fundamental constitutions, shall be thereby naturalized."<sup>3</sup>

<sup>1</sup> Stillé, "Life of Dickinson," 343.

<sup>2</sup> "Encyclopædia Britannica," XIV, 758.

<sup>3</sup> Poore, "Charters and Constitutions," II, 1408.



The first clause is followed by a prescribed form of oath, and we have here a plain reproduction of the "subscription" feature of those famous British Covenants which had appeared somewhat earlier in the same century. The idea thus early inaugurated was soon further developed by men of the race whose tendencies have been briefly noticed above.

Scotch immigration to South Carolina dates from about the beginning of the eighteenth century,<sup>1</sup> and as early as 1719 the race characteristics began to manifest themselves. That year witnessed a revolution against the proprietary government, and the leading spirit in the movement was one Alexander Skene, whose name sufficiently indicates his Scotch nationality,<sup>2</sup> and who had been secretary for the island of Barbadoes.<sup>3</sup> His method of organization was plainly modelled upon that of the British revolutionists of the preceding century.

"An *association* was secretly prepared. . . . Among many able and resolute patriots no particular leadership was assigned — wisdom, not war was needed — the commonwealth, the good of every man around them, was the object of their solicitude. Their declaration and resolutions were framed and mutual pledges given. The muster of the regiments took place according to order; and the people 'almost to a man' signed the resolutions submitted to them; and 'so the whole province was at once brought into a confederacy against the lords proprietors unknown to the governor.' . . . The people having joined the association had thereby 'promised and agreed to stand by and support whatsoever should be done by their representatives then newly chosen, in disengaging the country from the yoke and burden they labored under from the proprietors and putting the province under the government of his majesty.'"<sup>4</sup>

<sup>1</sup> Hanna, "The Scotch-Irish," II, 25 *et seq.*

<sup>2</sup> It was a common Scotch name found in Aberdeenshire before 1100. The "Ragman Roll" or list of the Scottish barons who swore fealty to Edward I about the close of the thirteenth century contains the names of three Skenes. A Scotchman of that name was governor of Pennsylvania in 1686. "The name is territorial and not derived from the weapon called a 'skene' or dagger, as has been heretofore unquestioningly believed, but from the lands of the name." — Hanna, "The Scotch-Irish," I, 48; II, 234, 403, 435, citing Anderson's "Genealogy and Surnames."

<sup>3</sup> Rivers, "History of South Carolina to the Close of the Proprietary Government" (Charleston, 1856), 296. The author adds that Skene "was skilful in the management of public affairs, was filled with resentment against the proprietors for turning him out of the council, because he had joined in the complaint against Mr. Trott. His experience and resolute character fitted him both for planning and consummating a revolution; and he exerted especial influence in the private meetings of members of the Assembly, held for considering the best method of delivering the province from the authority of the proprietors."

<sup>4</sup> *Id.* 296, 297, 299.

In all this we have complete instances of the "association" and the "covenant," and by such means the proprietary government was overthrown.<sup>1</sup>

The Scotch-Irish colonization of that part of South Carolina known as "the back country" began about the middle of the eighteenth century<sup>2</sup> with immigrants from Virginia and Pennsylvania.<sup>3</sup> The settlements were harassed considerably during the French and Indian War, and when peace came it left them in a disturbed condition easily a prey to enemies within their borders. They suffered particularly from horse-thieves, the suppression of whom was greatly hindered by the lack of an effective judicial system — the courts being held at Charleston, two hundred miles away.<sup>4</sup> In this situation, which was fast becoming intolerable, the settlers resorted to the covenant idea so common in the history of their race, and employed it for the most practical of all purposes — self-preservation.

The Nestor of South Carolina historians<sup>5</sup> thus describes the action taken:—

"In the year 1764, Joseph Kirkland, Barnaby Pope, and others of the best and most orderly inhabitants, held a consultation on what was best to be done. They drew up an instrument of writing which they and their associates generally subscribed. In it they bound themselves to make a common cause in immediately pursuing and arresting all horse-thieves and other criminals. Such, when caught, were tried in a summary way by the neighbors and, if found guilty, were sentenced to receive a number of stripes on their bare backs, more or less in proportion to their misdeeds. They were then advised to leave the neighborhood and informed that if they returned their punishment would be doubled. This mode of proceeding was called regulation, and its authors and friends regulators."

We have seen how the Scotch-Irish of Pennsylvania had "renewed" the Solemn League and Covenant more than twenty years before.<sup>6</sup> But here was an original covenant applied to new condi-

<sup>1</sup> Rivers, 309, 310.

<sup>2</sup> "Anthony Park, one of the first settlers of the back country . . . travelled in 1758 a few hundred miles among the Indians to the west of the Alleghany Mountains. He found several white men, chiefly Scotch or Irish, who said that they had lived as traders among the Indians twenty years; a few from forty to fifty and one sixty years." — Ramsay, "History of South Carolina" (Charleston, 1809), I, 208, note.

<sup>3</sup> *Id.* Chap. VI.

<sup>4</sup> *Id.* 210-212.

<sup>5</sup> *Id.* I, 212, 213.

<sup>6</sup> *Ante*, 109.

tions. It is most unfortunate that the text of this interesting document has not been preserved. But its character and purpose — the fact that it was a compact and “generally subscribed” — mark it as belonging to that class of local constitutions whose history we are now considering. It was, however, more than this.<sup>1</sup> The forming of “Regulators’ Associations” was met by a counter-movement on the part of their adversaries, and the latter seem to have secured the favor of the provincial authorities. A High Commissioner, Scoull, was appointed by the governor, and his espousal of the cause of those opposed to the Regulators was such that armed strife between the two parties was narrowly averted. The establishment of circuit courts tended to remove some of the grievances, but the feud continued, nevertheless, until the outbreak of the revolution. The Regulators and “Scouillites” became the patriots and Tories of the succeeding decade, and the compact of 1764 was thus a preliminary step in the struggle for independence.<sup>2</sup>

In North Carolina the Regulators’ movement was a protest against abuses in the provincial government — excessive taxation and the extortion of colonial officers, — which, not long after the middle of the eighteenth century, had caused popular discontent, chronic and deep-seated. The leader of the popular party during this stormy period was one Herman Husbands, whose chronicle, styled “Husbands’ Relation,”<sup>3</sup> is an important source for the history of the time. It is a homely narrative, often ungrammatical and sometimes coarse, but it states the grievances of an oppressed yeomanry with a forceful directness that recalls the complaints of Piers Plowman and Wat Tyler.<sup>4</sup>

<sup>1</sup> See Ramsey, I, 213, 214.

<sup>2</sup> But see *post*, 117, note 6.

<sup>3</sup> It was printed 1770, and is reprinted in Wheeler, “History of North Carolina” (Philadelphia, 1851), II, 301 *et seq.*, who says that he found “the only perfect copy extant” in the library of Philadelphia.

<sup>4</sup> Following is an illustration: “A poor man is supposed to have given his judgment bond for five pounds; and this bond is by his creditor thrown into court. The Clerk of the County has to enter it on the docket, and issue execution, the work of one long minute, for which the poor man has to pay him the trifling sum of forty-one shillings and five pence. The Clerk, in consideration he is a poor man, takes it out in work at eighteen pence a day. The poor man works some more than twenty-seven days to pay for this one minute’s writing.

“Well, the poor man reflects thus: At this rate when shall I get to labor for my family? I have a wife and a parcel of small children suffering at home, and here I have lost a whole month, and I don’t know for what; for my merchant is as far from

As early as 1766, Husbands tells us, after the people of several counties had refused to pay taxes, a paper was circulated in Orange County in which, after reciting the evils complained of,

"the following proposal is submitted to the public, to wit: Let each neighborhood throughout the county meet together and appoint one or more men to attend a general meeting on the Monday before next November Court, at a suitable place, where there is no liquor (at Maddock's Mill if no objection); at which meeting let it be judiciously inquired into, whether the freemen of this county labor under any abuses of power or not; and let the same be notified in writing if any is found, and the matter freely conversed upon and proper measures used for amendment."<sup>1</sup>

Out of the movement thus inaugurated sprang the Regulators of North Carolina whom Husbands refers to as "this new association," and of which he says that "people had entered into it by hundreds, and it spread every way like fire."<sup>2</sup>

At a meeting of these Orange County Regulators in March, 1768, they adopted a set of articles as follows:<sup>3</sup>—

"We the subscribers do voluntarily agree to form ourselves into an association to assemble ourselves for conference for regulating public grievances and abuses of power, in the following particulars with others of the like nature that may occur:

"1st. That we will pay no more taxes until we are satisfied that they are agreeable to law, and applied to the purposes therein mentioned, unless we cannot help it or are forced.

being paid yet as ever. However, I will go home now and try and do what I can. Stay, neighbor, you have not half done yet; there is a d—d lawyer's mouth to stop yet—for you impowered him to confess that you owed this five pounds, and you have thirty shillings to pay him for that or go and work nineteen days more; and then you must work as long to pay the sheriff for his trouble; and then you may go home and see your horses and cow sold, and all your personal estate, for one-tenth part of the value to pay off your merchant. And lastly, if the debt is so great that all your personal estate will not do to raise the money, which is not to be had,—then goes your lands the same way to satisfy these cursed hungry caterpillars that will eat out the very bowels of our commonwealth if they are not pulled down from their nests in a very short time. And what need I say to urge a reformation? If these things were absolutely according to law, it were enough to make us throw off all submission to such tyrannical laws; for were such things tolerated, it would be better to die in defence of our privileges than to perish for want of the means of subsistence. But as these practices are contrary to law, it is our duty to put a stop to them before they quite ruin our country, or that we become willing slaves to these lawless wretches, and hug our chains of bondage and remain contented under these accumulated calamities."—Wheeler, II, 301, 302.

<sup>1</sup> Id. 303.

<sup>2</sup> Id. 305.

<sup>3</sup> Id. 306; "Colonial Records of North Carolina" (Raleigh, 1890), 671.

"2d. That we will pay no officer any more fees than the law allows, unless we are obliged to it, and then to show our dislike and bear an open testimony against it.

"3d. That we will attend our meetings of conference as often as we conveniently can, and is necessary, in order to consult our representatives of the amendment of such laws as may be found grievous or unnecessary; and to choose more suitable men than we have done heretofore for burgesses and vestrymen; and to petition the House of Assembly, Governor, Council, King and Parliament &c. for redress in such grievances as in the course of the undertaking may occur; and to inform one another, learn, know and enjoy all the privileges and liberties that are allowed and were settled upon us by our worthy ancestors, the founders of our present constitution, in order to preserve it on its ancient foundation, that it may stand firm and unshaken.

"4th. That we will contribute to collections for defraying necessary expenses attending the work according to our abilities.

"5th. That in case of difference in judgment, we will submit to the judgment of the majority of our body.

"To all which we solemnly swear, or, being a Quaker, or otherwise scrupulous in conscience of the common oath, do solemnly affirm, that we will stand true and faithful to this cause, till we bring things to a true regulation, according to the true intent and meaning hereof in the judgment of the majority of us."

How strikingly does this recall the East Anglian compacts of a century and a quarter previous! Even the name "association" (they elsewhere style themselves "associators"<sup>1</sup>) is that used by the sturdy yeomanry who ushered in the English Commonwealth. The instrument itself is, of course, a covenant. It is "we the subscribers" who bind themselves and are entitled to its benefits, and the doctrine of "common assent" is expressly retained by the last clause which requires all to "submit to the judgment of the majority."

The same ideas are set forth in the following oath of the Regulators:—

"I, A. B., do promise and swear, that if any officer or any other person, do make distress on any of the goods or other estate of any person sworn herein, *being a subscriber*, for the non-payment of the said tax, that I will with other sufficient assistance, go and take, if in my power, from said officer, and restore it to the party from whom taken, and in case any one concerned herein should be imprisoned or under arrest, or otherwise confined, or his estate or any part thereof, by reason or means of joining into this company of Regulators, for the non-payment of taxes, that I will immediately do my best endeavors to raise as many of the said subscribers, as will be of force sufficient, and if in my power, set the said person and his estate at liberty; and I do further promise and swear, that if in

<sup>1</sup> In resolutions adopted by them on May 21, 1768. Wheeler, "History of North Carolina," II, 309.

this case, this our scheme should be broke, or otherwise give out our intention, any of our company should be put to any expense or under any confinement that I will be an equal share with those in being to pay and make up the sufferer.

"All these things I do promise and swear and subscribe my name."<sup>1</sup>

An "Association" similar to that of Orange County was formed in Anson County.<sup>2</sup> It consisted "of about five hundred men, resolving, should no happier event interfere to our succor, to defend our cause in the disagreeable manner of force and to have persisted unto blood."<sup>3</sup> The governor is asked to remove the obnoxious officials, "and also to recommend by the voice of the country such persons as will judiciously discharge their several offices."<sup>4</sup>

The Regulators' agitation continued with increasing fierceness until in 1771 they came into armed conflict with the provincial forces. Meeting on the banks of the Allamance River, on May 16 of that year, a fierce battle ensued in which the Regulators were finally defeated, though their loss appears to have been less than that of the king's army. "Thus and here," says Wheeler,<sup>5</sup> "was the first blood spilled in these United States, in resistance to exactions of English rulers and oppressions by the English government."

But the disaffection did not end with this battle of the Allamance. The movement continued to agitate the colony during subsequent years, and, while it may not have been, as formerly supposed, the prologue to the American Revolution, it certainly had its influence upon that struggle.<sup>6</sup> It is surely significant that the first formal assertion, during the revolutionary period,<sup>7</sup> of independence of Great Britain, was made here, for it was inspired by men of the same race who furnished the bone and sinew of the Regulators' movement. "The Scotch-Irish patriots of Mecklenburg county in North Carolina," says Fiske,<sup>8</sup> "ventured upon a measure more decided than

<sup>1</sup> Wheeler, "History of North Carolina," II, 18.

<sup>2</sup> Id. I, 56.

<sup>3</sup> Id. II, 22.

<sup>4</sup> Id. 23.

<sup>5</sup> Id. I, 59.

<sup>6</sup> "Investigation leads to the view that the Regulators could have no direct connection with the Revolution. I can see no continuity of influence. . . . There is a sense, however, in which the Regulation influenced the Revolution. The struggle was a grand object lesson to the whole country. It set the people to thinking of armed resistance. Failure as it was it showed how weak the British army would be in a hostile country." — Bassett, "The North Carolina Regulators," American Historical Association Reports, (1894), 211. (House Miscellaneous Documents, 3d Session, 53d Congress (1894-1895), XVII.) Cf. 142.

<sup>7</sup> We have seen that there was such a declaration thirty years before, *ante*, 109.

<sup>8</sup> "The American Revolution" (Boston, 1899), I, 127, 128.

any that had yet been taken in any part of the country." It was in this county on May 31, 1775, that the famous "Resolves"<sup>1</sup> were adopted by which it was declared that "all laws and commissions confirmed by or derived from the authority of the king and parliament are annulled and vacated," and new laws were promulgated and a government established for their execution. Strong evidence has been produced in support of the claim that in this same county, a formal declaration of independence, rivalling in tone the Philadelphia instrument of the following year, had been issued eleven days before the adoption of these "Resolves."<sup>2</sup> The claim is rejected by some,<sup>3</sup> nor is its establishment essential to the glory of this liberty-loving people. Their known and unchallenged history for the preceding decade is one of the important chapters in our national development, for they were then not only paving the way to independence — they were likewise laying the foundations of the popular written constitution of the South. That the first recorded demand

<sup>1</sup> They are printed in full in Wheeler, "History of North Carolina," II, 255, 256.

John McKnitt Alexander, secretary of the convention, was descended from a Maryland Scotch-Irish family. See Hanna, "The Scotch-Irish," II, 60.

<sup>2</sup> See a valuable paper on this subject by Dr. George W. Graham, "Proceedings 7th Scotch-Irish Congress," 140, where the evidence is marshalled in support of the claim. He says: "Professor Alexander Graham of Charlotte, N.C., and myself have made a thorough investigation of this question during the past four years, and now present to this honorable assembly the result of our research. It will be found to contain much new evidence that has never appeared in print, and, we think, will remove all existing doubt as to there having been a declaration of independence by the Scotch-Irish of Mecklenburg on May 20, 1775."

The alleged text is printed by Wheeler, I, 69, 70, who says that they are "from the pen of Dr. Ephraim Brevard." Cf. Ramsey, "Annals of Tennessee" (Philadelphia, 1860), 128; Moore, "Defence of the Mecklenburg Declaration of Independence."

<sup>3</sup> "The early writers of United States history passed over the proceedings of May 31st in silence, and presently the North Carolina patriots tried to supply an account of them from memory. Their traditional account was not published until 1819, when it was found to contain a spurious document, giving the substance of some of the foregoing resolves, decorated with phrases borrowed from the great Declaration of Independence of 1776. This document purported to have been drawn up and signed at a county meeting on the 20th of May. A fierce controversy sprang up over the genuineness of the document, which was promptly called in question. For a long time many people believed in it, and were inclined to charge Jefferson with having plagiarized from it in writing the Declaration of Independence. But a minute investigation of all the newspapers of May, 1775, has shown that no such meeting was held on the 20th, and that no such document was made public. The story of the Mecklenburg Declaration is simply a legend, based upon the distorted recollection of the real proceedings." — Fiske, "The American Revolution" (Boston, 1899), I, 128, 129. Cf. *Am. Hist. Rev.* XIII, 16.

anywhere in that region for a popularly ratified state constitution came from these counties of Mecklenburg and Orange was no accidental occurrence.

#### D. Tennessee

##### 1. *The Watauga Compact* (1772)

The two main streams in which, as we have seen, the Scotch-Irish immigrants crossed the ocean converged in what is now eastern Tennessee. Portions of the northern stream, following the great watercourses on the western slope of the Alleghenies,<sup>1</sup> met a branch of the other, which had crossed the mountains from the Atlantic seaboard<sup>2</sup> and a few years before the American Revolution formed what is known as the "Watauga Settlement." At that time the locality was supposed to be a part of Virginia. It proved, however, to be within the limits of North Carolina.<sup>3</sup> But the seat of government of that province was remote and separated from the new settlement by mountain ranges. The province, too, was then, as we have seen, in the throes of a civil war, and the settlers of Watauga, many of whom had been participants in the Regulators' movement,<sup>4</sup> had little reason to expect assistance from, and probably little desire for the establishment of relations with, the provincial government which had become so obnoxious to the yeomanry of North Carolina. In this emergency the settlers repeated the civic history of their race. Like the Puritans of early New England, they organized a civil government of their own, which, though independent of existing authority, was not cut off entirely from connection with the past, but was formed according to the ideals and precedents with which its founders were familiar.

One of the leading spirits in the formation of the Watauga government was James Robertson. He was a Scotch-Irish Presbyterian,<sup>5</sup> though born in Virginia, whence he had emigrated to North Carolina.

<sup>1</sup> Roosevelt, "Winning of the West" (New York, 1889), I, 167.

<sup>2</sup> Id. Cf. Campbell, "The Puritan in Holland, England, and America" (New York, 1892), II, 485.

<sup>3</sup> Roosevelt, I, 170 *et seq.* Note the parallel to the situation under which the Mayflower Compact was formed, *ante*, 69.

<sup>4</sup> Gilmore, "The Rear Guard of the American Revolution" (New York, 1889), 39.

<sup>5</sup> Gilmore, "The Advance Guard of Western Civilization" (New York, 1888), 29; Roosevelt, I, 103, note 1.



His home there was in Wake County,<sup>1</sup> nearly contiguous to Orange, where the Regulators' movement began. He was familiar with their grievances, their methods of organization and action, and, by no means least of all, with the plain-spoken utterances of "Husbands' Relation."<sup>2</sup> Robertson and his fellow-immigrants from North Carolina came to Watauga fully imbued with the ideas of the Regulators,<sup>3</sup> including their plans of "association" and "covenant." "It is not unreasonable to conclude," observes Professor Turner,<sup>4</sup> "that the suggestion of the Watauga Association may have been due to the Regulating Associations." We need not be surprised, therefore, to learn that these Watauga settlers in the year 1772 adopted a civil compact which they styled "Articles of Agreement." President Roosevelt says:—

"They formed a written constitution, the first ever adopted west of the mountains, or by a community composed of American-born freemen."<sup>5</sup>

It certainly appears to have been the first instrument of its class west of the Alleghenies and it preceded by a considerable interval the brilliant array of constitutions which we shall soon reach and which appeared in the early days of the Revolution.<sup>6</sup> But it clearly followed along the lines of the Regulators' compact<sup>7</sup> of 1768, and it must also be compared with the compacts of colonial New England,<sup>8</sup> for it was the product of strikingly similar conditions and is plainly of their class.

Our information concerning this most interesting episode in

<sup>1</sup> "It is said that the greatest proportion of the early settlers came from Wake County, N.C., as did Robertson; but many of them, like Robertson, were of Virginia birth, and the great majority were of the same stock as the Virginian and Pennsylvanian mountaineers." — Roosevelt, I, 172, note.

<sup>2</sup> Putnam, "History of Middle Tennessee" (Nashville, 1859), 19.

<sup>3</sup> Robertson came to Watauga with Boone's exploring party. "He had been deputed by a number of his neighbors to find 'good springs and rich lands and enough of both to accommodate them all,' where they could form a community of friends free from political oppression and the insolence of the 'red-coated minions' of 'the great he-wolf of North Carolina,' Governor Tryon." — Gilmore, "The Rear Guard of the American Revolution" (New York, 1889), 40.

<sup>4</sup> "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 76.

<sup>5</sup> "Winning of the West," I, 183. Cf. Ramsey, "Annals of Tennessee" (Philadelphia, 1860), 107.

<sup>6</sup> It antedated by nearly four years the New Hampshire constitution which appears to have been the earliest. See *post*, 139.

<sup>7</sup> *Ante*, 115, 116.

<sup>8</sup> *Ante*, Chap. VII.

southern constitutional history is unfortunately meagre. Even the text of the "Articles" has been lost. An historian of Tennessee, writing almost a half a century ago, pathetically says that they —

"would make a valuable and exceedingly interesting contribution to the historical literature of the Great West, and a most desirable addition especially to these annals. But after the most diligent inquiry and patient search this writer has been unable to discover them."<sup>1</sup>

Enough is known of these "Articles," however, to show that they formed a genuine popular constitution and that they were adopted by the voice of the freemen in what appears to have been a real folk-moot.<sup>2</sup> In this assembly commissioners or representatives were elected from whom were chosen the tribunal of five members which was to carry on the work of administration, executive and judicial. But the historians all speak of the adoption of the "Articles" before mentioning the election of commissioners,<sup>3</sup> and it could hardly have been the latter who gave the "Articles" validity. But the details of their adoption, so unfortunately wanting, were probably reproduced a few years later, in connection with another instrument of which this was the parent, and to the later one we may well turn for light as to the methods of constitution-making in this primitive community.

## 2. *The Nashborough Articles (1780)*

The work of James Robertson was not ended by the adoption of the Watauga Compact. Notwithstanding his residence among the Regulators and his prominent part in the episode just reviewed, he was destined to have a yet larger share in the constitutional achievements of this frontier people. After a sojourn of about ten years at Watauga, during most of which he was active in all its affairs, the spirit of adventure led him to organize a new colony for settlement on the great bend of the Cumberland River some three hundred miles to the west. In 1779 he led the advance guard thither, and the following year he founded Nashborough, nucleus of the future capital of Tennessee. Hardly had the families of the settlers arrived when

<sup>1</sup> Ramsey, "Annals of Tennessee," 107.

<sup>2</sup> "The first step taken by the Watauga settlers, when they had determined to organize, was to meet in general convention, holding a kind of folk-thing, akin to the New England town-meeting." — Roosevelt, "Winning of the West," I, 184.

<sup>3</sup> Ramsey, "Annals of Tennessee," 106; Roosevelt, I, 183; Phelan, "History of Tennessee" (Boston, 1888), 33.

Robertson called a convention of delegates from the little forts that composed the settlement to meet at Nashborough for the purpose of organizing a government. One of the results of this meeting, which opened on May 1, 1780, was the adoption of a "compact of government,"<sup>1</sup> of which Robertson is believed to have been the principal author. His prominence in the making of the Watauga constitution, upon which the new instrument was largely modelled,<sup>2</sup> together with the fact that Robertson both summoned the convention<sup>3</sup> and by it was chosen president of the colony,<sup>4</sup> strongly indicate that the compact was principally his handiwork. Just as at Watauga the tribunal of five managed the affairs of the settlement, so this Cumberland compact provided for a central body of twelve chosen from the different "stations" by popular vote and variously known as notables, judges, arbitrators, and triers. This body<sup>5</sup> had final jurisdiction to try title to land, actions to recover money, and criminal causes. It also had charge of probate matters, the solemnization of marriages, and the administration of military affairs.

"We find," says Phelan,<sup>6</sup> "the same incidents of government in the Cumberland settlement which we found on the Watauga and which existed in some shape or manner upon the banks of the Trent and the Ouse. The articles of agreement are a modern reproduction of the powers and customs of the ancient court leet."

Speaking of the compact, Mr. Gilmore observes:<sup>7</sup>—

<sup>1</sup> "This document was found in 1846 in an old trunk which had belonged to one of the original twelve (committee), and it is now in possession of the Tennessee Historical Society." — Gilmore, "The Advance Guard of Western Civilization" (New York, 1888), 11.

<sup>2</sup> Richard Henderson, whose "Transylvania" experiment is considered in connection with Kentucky (*post*, 131), had meanwhile removed to the Cumberland settlement and was active in establishing the government. Mr. Phelan ("History of Tennessee," 119) ascribes to him a part in the framing of the Nashborough instrument equal, if not superior, to that of Robertson. But, as President Roosevelt well says ("Winning of the West," II, 343, note): "The marked difference between the Transylvania and the Cumberland 'constitutions,' and the close agreement of the latter with the Watauga articles, assuredly point to Robertson as the chief author."

<sup>3</sup> Roosevelt, II, 342.

<sup>4</sup> Gilmore, "The Advance Guard of Western Civilization" (New York, 1888), 11.

<sup>5</sup> President Roosevelt (II, 344-346) gives an instructive summary of its powers.

<sup>6</sup> "History of Tennessee" (Boston, 1888), 119. President Roosevelt adds that these were "profoundly modified to suit the peculiar needs of backwoods life, the intensely democratic temper of the pioneers and, above all, the military necessities of their existence." — "Winning of the West," II, 347.

<sup>7</sup> "The Advance Guard of Western Civilization" (New York, 1888), 11.

"It is a remarkable paper, so comprehensive, so wise in its provisions, and so exactly adapted to the circumstances of the settlement, that it alone would rank Robertson as an able organizer and statesman."

But interesting as this document is intrinsically, its chief significance for us lies in the manner of its adoption. For this primitive constitution of the Cumberland colony was not put into effect by its draftsman nor even by the convention at Nashborough. That body merely put it into form and agreed to its provisions in order that it might be placed before the freemen. The instrument acquired its force and validity from an event which occurred twelve days after the convention met. "The settlers ratified the deeds of their delegates," observes Roosevelt,<sup>1</sup> "on May 13th, when they signed the articles, binding themselves to obey them, to the number of two hundred and fifty-six men."<sup>2</sup> This instrument, in other words, was not a piece of legislation enacted by a delegate body; it was a genuine compact in which every settler who signed was a partner and which did not become operative as to any settler until he signed.

"Those who did not sign were treated as having no rights whatever—a proper and necessary measure, as it was essential that the naturally lawless elements should be forced to acknowledge some kind of authority."<sup>3</sup>

That the articles were to derive their force from the formally expressed consent of the whole body of the freemen is clear also from their contents.

"We think it our duty," they recite, "to associate and hereby form ourselves into one society for the benefit of present and future settlers; and, until the full and proper exercise of the laws of our country can be in use and the powers of government exerted among us, we do most solemnly and sacredly declare and promise each other that we will faithfully and punctually adhere to, perform and abide by this our association, and at all times, if need be, compel by our united force a due obedience to these our rules and regulations."<sup>4</sup>

This language could not be appropriately used by a mere body of delegates. It was plainly intended to be the expression of the whole people when they should adopt it.

Here, then, we have a genuine instance of complete popular con-

<sup>1</sup> "Winning of the West," II, 343, 344.

<sup>2</sup> "All but one of whom," adds Mr. Gilmore, "wrote their names in good fair English." — "The Advance Guard of Western Civilization" (New York, 1888), II, 12.

<sup>3</sup> "Winning of the West," II, 344.

<sup>4</sup> Quoted in Gilmore's "Advance Guard of Western Civilization," 12.

stitution-making. All three stages are represented, — the framing, the submission, the ratification. We do not know that all these stages were so clearly marked in making the Watauga constitution of eight years before (because, as we have seen, the records are missing), but we have strong reason to believe that such was the case. The same man was largely instrumental in framing each document; the subject-matter of both is strikingly similar; it is, to say the least, improbable that there was any marked divergence in the manner of their adoption.

In these compacts of the Scotch-Irish settlers, therefore, we have the first instance of direct popular ratification anywhere during the eighteenth century — the first, indeed, since the laws and compacts which had issued from the people of New England more than a century before. How shall we account for such a phenomenon in this wilderness of the South? It can hardly be explained on the ground of conscious imitation, for these frontiersmen were unfamiliar with constitutional precedents. James Robertson, who, as we have seen, had most to do with both of these primitive compacts, was a character possessing elements of greatness, but he had learned little from books. It is even said that his wife taught him to read after their marriage.<sup>1</sup> At any rate, he and his associates could scarcely have known aught of popular law-making in the New England of the preceding century.

We have seen that Robertson was familiar with the ways of the Regulators to whom these mountaineers were mostly akin, and with "Husbands' Relation," their great exponent. But the books which he knew most about were "the Bible and the few religious works which in that day were in wide circulation in the colonies."<sup>2</sup> And when we are searching for the sources from which Robertson and his fellow Calvinists acquired the idea of popular ratification, we must not overlook the church with which they were affiliated.

"The expedient [of a compact] was a natural one," says Professor Turner, to Scotch-Irishmen brought up on Presbyterian political philosophy.<sup>3</sup>

<sup>1</sup> Roosevelt, "Winning of the West" (New York, 1889), I, 177; Putnam, "History of Middle Tennessee" (Nashville, 1859), 21 *et seq.* Mr. Gilmore says that "this is denied by his descendants." — "Advance Guard of Western Civilization," 30.

<sup>2</sup> Gilmore, "The Advance Guard of Western Civilization" (New York, 1888), 30.

<sup>3</sup> "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 76.

"The backwoods Presbyterians," adds Roosevelt, "managed their church affairs much as they did their civil government; each congregation appointed a committee to choose ground, to build a meeting-house, to collect the minister's salary, and to pay all charges, by taxing the members proportionately for the same, the committee being required to turn in a full account, and receive instructions, at a general session or meeting held twice every year."<sup>1</sup>

Here we behold a practical application of the fundamental doctrines of Calvinism — congregational supremacy, common assent, and the equality of all members. But it was not alone their familiarity with church administration which made these frontiersmen the first constitution-makers of the eighteenth century. For the ideas underlying the popular compacts of Watauga and the Cumberland were a part of the race inheritance of their framers.<sup>2</sup>

"These Irish Presbyterians . . . were fitted to be Americans from the very start; they were kinsfolk of the Covenanters; they deemed it a religious duty to interpret their own Bible, and held for a divine right the election of their own clergy. For generations their whole ecclesiastic and scholastic systems had been fundamentally democratic."<sup>3</sup>

"Kinsfolk of the Covenanters" — in this phrase lies the key to the true nature and source of these backwoods constitutions. For what was the Cumberland compact or its parent instrument of Watauga but a "covenant" like that which the Scotch-Presbyterian ancestors of these colonists had put forth in 1638? or that in which the people of the three kingdoms joined five years later?<sup>4</sup> And what was this subscription to the Nashborough Articles by all the settlers but a repetition, doubtless unconscious, of the process by which their forebears, even in Ulster, had given their assent to the seventeenth-century covenants? Even the restriction of the benefits of the new instrument to the subscribing settlers was a feature of the old covenants. For that of 1643 required its signers merely to "assist and defend all those that enter [into] this league and covenant."<sup>5</sup> With all these precedents the Scotch-Irish who had come into the

<sup>1</sup> "Winning of the West" (New York, 1889), I, 191.

<sup>2</sup> "Descendants of men who had fought James II., they were the heirs of the political philosophy of Knox and Andrew Melville." — Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 73.

<sup>3</sup> Roosevelt, "Winning of the West," I, 106.

<sup>4</sup> "As the Scotch-Irish came to America, they brought with them the Solemn League and Covenant." — Phelan, "History of Tennessee" (Boston, 1888), 216.

<sup>5</sup> Clarendon, "History of the Rebellion and Civil Wars" (Oxford, 1849), III, 218.

settlements from the North were as familiar as those who had mingled with the Regulators in North Carolina.

### 3. *The "Frankland" Constitution*

Thus did these pioneer commonwealth-builders of the South utilize the materials of the old world quarries. But their achievements did not cease with the instruments above reviewed nor even with the close of the Revolution. About a year after the last-named event these same settlements, with others which had been formed meanwhile, were organized into a single commonwealth which had an independent existence of some four years, and which is known in history as the "state of Franklin."<sup>1</sup> On December 14, 1784, a popularly chosen convention assembled at Jonesboro,<sup>2</sup> in what is now eastern Tennessee, and framed a constitution for the new state which it named the "commonwealth of Frankland."<sup>3</sup> This instrument did not provide for its direct submission to the people. But on the other hand the members of this convention were too much imbued with the doctrine of "common assent" to assume the power of proclaiming the new constitution in force. It was, therefore, merely "agreed to, subject to the ratification, modification or rejection of a future convention directed to be chosen by the people and to meet on the 14th of November, 1785, at Greenville. Ample time was thus given to examine the merits and defects of the new organization, and, by discussing them in detail, to harmonize conflicting opinions, and to secure to it general public sentiment and popular favour."<sup>4</sup>

This action was not the only evidence of a desire on the part of these delegates to consult the people. Besides containing a liberal Bill of Rights,<sup>5</sup> guaranteeing religious freedom for all sects, and requiring all officers to be chosen directly by the people (a most advanced provision for that day), the proposed constitution provided:—

"Sec. 7. That the laws, before they are enacted, may be more maturely considered, and the danger of hasty and injudicious determinations as much as possible prevented, all bills of a public and general nature *shall be printed for the consideration of the people*, before they are read in the General Assembly the last

<sup>1</sup> See Alden, "The State of Franklin," *American Historical Review*, VIII, 271.

<sup>2</sup> Id. 274. See Ramsey, "Annals of Tennessee" (Philadelphia, 1860), 292 *et seq.*, for an account of this convention. John Sevier was its President.

<sup>3</sup> I.e. "the land of freemen." The convention of the following year officially named it Franklin "in honour of Benjamin Franklin." — Ramsey, 324.

<sup>4</sup> Id. 293.

<sup>5</sup> See id. 325 *et seq.* for the text of the constitution so far as preserved.

time for debate and amendment; and except on occasions of sudden necessity, shall not be passed into laws before the next session of the Assembly."<sup>1</sup>

This appears to have been the nearest approach to the referendum in general legislation since the Rhode Island experiments of the seventeenth century.<sup>2</sup> But there are other features indicating even greater antiquity. Section 20 provided that:—

"The freemen of each county shall, for the purpose of ease, justice and conveniency in holding elections and other public affairs, be divided into districts, as near one hundred in each as local circumstances will admit."<sup>3</sup>

This reads like a revival or at least an imitation of the old English "hundred," which, though it had existed in several of the colonies, at least in name, was now moribund in all save Delaware.<sup>4</sup> But the purpose of this district is more interesting even than its history. Section 21 of the proposed constitution was as follows:—

"The freemen of each district shall meet upon the second Tuesday of February forever (*sic*) and at their first meeting elect three of their own members, who shall be called Registers, and who shall keep a fair alphabetical roll of the freemen of the district. Any two of them agreeing, or upon advice of any five freemen, shall have power to assemble the freemen of their district to consult for the common good, *give instructions to their representatives*, or apply to the Legislature for redress of grievances by address, petition or remonstrance. They shall preside in all civil district elections, shall meet twice or oftener, in the year, to deliberate upon and prepare to lay before the people such matters as may be necessary for them to consider."<sup>5</sup>

It would almost seem here as though the constitution-maker was taking as his model the New England town meeting. But he was more probably merely imitating the organization of the local church. For, aside from the fact that Rev. Samuel Houston was one of the leading spirits in the convention,<sup>6</sup> there are other traces of clerical influence. Officeholders must not only be free from infractions of the moral law, Sabbath-breaking included, but must also believe in the Trinity, the inspiration of the scriptures, and "a future state of rewards and punishments."<sup>7</sup>

On the other hand this instrument would disqualify ministers,

<sup>1</sup> Ramsey, "Annals of Tennessee" (Philadelphia, 1860), 328.

<sup>2</sup> Except the similar provision in the Pennsylvania instrument of 1776.

<sup>3</sup> Ramsey, "Annals of Tennessee" (Philadelphia, 1860), 330.

<sup>4</sup> See Howard, "Local Constitutional History" (Baltimore, 1889), 272 *et seq.*

<sup>5</sup> Ramsey, 330.

<sup>6</sup> Alden, "The State of Franklin," *American Historical Review*, VIII, 274.

<sup>7</sup> Constitution of Frankland, Sec. 3.



lawyers, and "doctors of physic" from membership in the legislature, which was to be unicameral and to which only landowners were to be eligible.<sup>1</sup> Such inconsistencies as these occasioned great opposition when what was in form an election of delegates to the second convention but in reality a submission of the instrument, took place. But it was these latter and not the democratic features which were obnoxious.<sup>2</sup> Indeed the democratic spirit was most apparent in the opposition. "Instructions were poured in upon the convention from all parts of the country in opposition to the exceptionable clauses."<sup>3</sup> In this situation the delegates appointed a committee to draft a new instrument for their consideration.<sup>4</sup> This committee is said to have taken as the basis of its work the existing constitution of North Carolina, "and together with it all political helps that the thirteen Constitutions, the instructions of the people, and any other quarter might afford."<sup>5</sup> We may suspect, however, that its chief model after all was the "Frankland" constitution. For when the committee reported and its work was rejected,—

"the friends of the Report of the Committee strove to introduce, but all in vain, *some material parts of their plan*, viz., a single house of Legislation, equal and adequate representation, the exclusion of attorneys from the Assembly, etc., and failing in *these most important points*, by the unanimous consent of the whole convention, obtained leave to enter upon the Journals their dissent to what had been carried in Convention, and also to hold out to the people, for their consideration, the Report of the Committee."<sup>6</sup>

These "material parts" and "most important points," it will be noticed, were the novel features of the "Frankland" instrument. Rejecting even this modified form of it, the convention "by a small majority"<sup>7</sup> voted to adopt a substantial reenactment of the North

<sup>1</sup> Constitution of Frankland, Secs. 1, 3.

<sup>2</sup> Ramsey, "Annals of Tennessee," 323; Phelan, "History of Tennessee," 85.

<sup>3</sup> Ramsey, 323. Cf. Houston's preface to the proposed constitution of 1785, *American Historical Review*, VIII, 274, where he says that these instructions from the people "showed that there was a great diversity and contrariety of sentiments among them."

<sup>4</sup> Ramsey says (323) that the "Frankland constitution was rejected by a small majority." Houston, who was a member of the convention, writes as though no action was taken directly thereon, but that, "after some debate," the convention proceeded to appoint the committee. See *American Historical Review*, VIII, 274.

<sup>5</sup> Id.

<sup>6</sup> From Houston's preface, id. 275.

<sup>7</sup> Ramsey, 324.

Carolina constitution.<sup>1</sup> But Houston and the supporters of the committee's draft continued their efforts. They formed an organization called the "Frankland Commonwealth Society," and caused the instrument of 1784 to be printed and circulated among the people with Houston's preface and a pamphlet entitled "Principles of Republican Government, by a Citizen of Frankland."<sup>2</sup> But by this time it was doubtless beginning to be understood among the people that their state was only a temporary one, destined to be absorbed, as for a time most of it was, by North Carolina. And so for the balance of its brief career it continued under the fundamental law of its eastern neighbor.

#### 4. *The "Association" of 1788*

But the genius of these frontiersmen for constitution-making was not yet exhausted. Even after the greater part of the state of Franklin had become reunited to North Carolina the settlers of a portion of it which had never been under the jurisdiction of that state, and which was thus left without a government, organized one of their own in 1788, by forming an "association" and adopting articles.<sup>3</sup> These were not only modelled on the Watauga compact of sixteen years before, but they also bear on their face the evidence of having been ratified by the settlers.

"We the *subscribers*," they recite, "inhabiting south of Holston, French Broad and Big Pigeon Rivers . . . for the preservation of peace and good order, and the security of life, liberty and property, . . . enter into the following social compact."

Here we have another covenant. It clearly operates to benefit and bind only the "subscribers," and is effective as to no others.

"The association proved to be a good substitute," says Ramsey,<sup>4</sup> "for a more formal and perfect system of government. This régime continued until after the country became the Territory of the United States south of the River Ohio, and was then provided for as the 'county of Sevier,' in 1794."

Thus for nearly a score of years these foundation builders of the future commonwealth of Tennessee were engaged in the making of

<sup>1</sup> The question seems to have been complicated with a personal feud between Tipton, an advocate of the "Frankland" constitution, and Sevier, who favored the North Carolina model. See Roosevelt, "Winning of the West," III, 167.

<sup>2</sup> This is Ramsey's version (324), based on a letter to him from Houston, written a half a century after the event. Alden (*American Historical Review*, VIII, 275) says that the instrument printed and prefaced was that reported by the committee.

<sup>3</sup> Their text is given in Ramsey, 435, 436.

<sup>4</sup> Id. 437.

popular constitutions. They needed no town meetings to preserve the idea until their independence could be achieved, for they put it in actual practice both at the dawn of, and during, the Revolution. Their experience is a most important, though much neglected, chapter in American constitutional development, and to it is applicable a remark once made of Rhode Island, that "the diversity of character and interest in the smallest of the colonies is another illustration of the truth taught by Greek and Italian history, that it is not always the large States that afford the most instructive data for political history."<sup>1</sup>

### *E. Virginia*

The Scotch-Irish appear to have settled in Virginia somewhat later than in the other colonies whose history will be reviewed in this connection, and the material relating to them is less abundant. It is known, however, that as early as 1737 a Scotch-Irish colony was planted in what is now West Virginia.<sup>2</sup> Even before this there had been some settlements of these immigrants farther east,<sup>3</sup> and in course of time they were dispersed throughout not only the regions west of the mountains, but also a large part of all western Virginia.<sup>4</sup> These Scotch-Irish of the Old Dominion appear to have left few traces of their early civic life in their new home. We catch a glimpse of it, however, at the outbreak of the Revolution.

When the first Virginia constitutional convention was in session at Williamsburg, it received a communication from the inhabitants of what is known as the "Pendleton District," lying west of Fincastle County,<sup>5</sup> stating that they had "formed themselves into a Society."<sup>6</sup> This item of information is meagre, but, taken in connection with what was occurring farther to the southwest, it clearly indicates that the Scotch-Irish settlers of western Virginia were at that moment duplicating the experience of their brethren at Watauga. Doubtless

<sup>1</sup> *The Nation*, XXXIX, 117.

<sup>2</sup> Lewis, "History of West Virginia" (Philadelphia, 1889), 68 *et seq.*

<sup>3</sup> Hanna, "The Scotch-Irish" (New York, 1902), II, 44 *et seq.*

<sup>4</sup> *Id.*, and frontispiece containing a chart of Scotch-Irish settlements.

<sup>5</sup> This was one of the extreme southwestern counties existing only from 1772 to 1776. Lewis, "History of West Virginia" (Philadelphia, 1889), 48, 2.

<sup>6</sup> Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 76 note. Cf. Ranck's "Boonesborough," Filson Club Publications, No. 16 (Louisville, 1901), 244.

if the record of their proceedings had been preserved, it would have disclosed a written covenant similar to those which so narrowly escaped oblivion in Tennessee and the Carolinas.

### F. Kentucky

One of the results of the explorations of Daniel Boone was the formation of a syndicate which was connected for a time with the Watauga settlement, in North Carolina, called the Transylvania Company, which purchased a large quantity of land in the newly explored region. The company consisted of nine proprietors, and at its head was Richard Henderson,<sup>1</sup> who was a lawyer of considerable learning for colonial times and had been one of the Associate Justices of the province of North Carolina.

In the spring of 1775, Henderson went to Kentucky for the purpose of establishing a government for the country purchased by the company, and which was named "the colony of Transylvania."<sup>2</sup> Before leaving North Carolina, Henderson appears to have had in mind the institution of a proprietary province.<sup>3</sup> But, as Turner says: "If ever the Carolina proprietary had been his model, it suffered a forest-change." Henderson was of Scotch-Irish extraction,<sup>4</sup> and the plan finally evolved shows the influence of ancestral ideas. Moreover, he had reason to be familiar with the "associations" and compacts of the North Carolina "Regulators." He had encountered them during his judicial career,<sup>5</sup> and learned in a practical way their strength and effectiveness. And he appears to have shared their views, for he is said to have resigned his judgeship "out of sympathy

<sup>1</sup> See a brief biographical sketch in Collins, "History of Kentucky," 336. Cf. Wheeler, "History of North Carolina," I, 102; "Richard Henderson: The Founder of Transylvania," *Chautauquan* (Dec. 1903), XXXVIII, 366, by Archer Butler Hulbert.

<sup>2</sup> See Henderson's Journal, Collins, 500; Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 78; Roosevelt, "Winning of the West" (New York, 1889), I, 248.

<sup>3</sup> "The memories of Clarendon and Monk and the Fundamental Constitutions of John Locke would seem to have taken possession of the mind of the Carolina jurist, and visions of a new palatinate in the backwoods to have arisen before him." — Turner, *American Historical Review*, I, 78.

<sup>4</sup> *Id.* 79.

<sup>5</sup> Collins, "History of Kentucky," 336; Turner, *American Historical Review*, I, 78.

<sup>6</sup> At Hillsboro in Sept., 1770, the sessions of his court were broken up by the Regulators, and he, "finding it impossible to hold court, left Hillsboro in the night." — Wheeler, "History of North Carolina" (Philadelphia, 1885), I, 57.

with the Regulators."<sup>1</sup> At any rate the compact theory entered largely into the form of government which he devised. He called a convention to meet at Boonesborough, and "made out writings for the different towns or settlements to sign."<sup>2</sup> He says:—

"We were in four distinct settlements. Members or delegates [should be elected] from every place by free choice of Individuals, they first having entered into writing solemnly binding themselves to obey and carry into Execution such Laws as representatives should from time to time make, concurred with by a Majority of the Proprietors present in the Country."<sup>3</sup>

The convention, which was really intended to be a legislature, met on May 23, 1775, under a spreading elm which Henderson refers to as "this divine tree," and upon which he discourses graphically in his Journal.<sup>4</sup> Although the initial engagements of the Revolution had already been fought, Henderson seems not to have known it, for he tells the convention in his opening address, which is really a superior production both in form and substance,<sup>5</sup> to

"Take for your guide as much of the spirit and genius of the laws of England as can be interwoven with those of this country. We are all Englishmen, or, what amounts to the same, ourselves and our fathers have, for many generations, experienced the invaluable blessings of that most excellent constitution, and surely we cannot want motives to copy from so noble an original."<sup>6</sup>

He also tells them, however, that "all power is originally in the people,"<sup>7</sup> and on the first business day of the session a committee was appointed "to draw up a *compact* between the proprietors and the people of this colony."<sup>8</sup> Two days later the committee reported what was styled in the preamble a

"contract and agreement" between "the proprietors of the colony of Transylvania of the one part, and the representatives of the people of said colony in convention assembled, of the other part."<sup>9</sup>

This document has been called the "Kentucky Magna Charta,"<sup>10</sup> and was really quite an advanced instrument, containing most of the

<sup>1</sup> Gilmore, "Rear Guard of the Revolution" (New York, 1889), 39.

<sup>2</sup> Henderson's "Journal," Collins, "History of Kentucky" (Louisville, 1877), 500.

<sup>3</sup> Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 79.

<sup>4</sup> Collins, 500.

<sup>5</sup> Roosevelt remarks that "Henderson . . . addressed them, much as a crown governor would have done."—"Winning of the West," I, 262. The address is printed in Collins, 502, 503. <sup>6</sup> Collins, 503. <sup>7</sup> Id. 502. <sup>8</sup> Id. 505.

<sup>9</sup> Id. 506, 507, where the instrument is set out in full.

<sup>10</sup> Id. 337.

leading provisions to be found in the first state constitutions, which it antedated almost a year. It was signed by three of the proprietors on their own behalf and by the chairman of the convention on behalf of the people.

On the day of the signing of this compact the convention adjourned, ostensibly to meet in the following September, but in reality never to reassemble. The Virginia legislature declared the Transylvania purchase void<sup>1</sup> and the colonial government was abandoned. But this interesting constitutional experiment was not the only instance of the covenant idea among these first settlers of Kentucky. Even before the events above described they had applied it to such a common, though to them, most important, enterprise as the raising of a crop of corn which they had planted.

"Companies were organized to work it in common, the members signing an agreement to appear every morning at the blast of a horn or sound of a drum and labor in the field or stand guard while others worked as the 'captain' required."<sup>2</sup>

About four years later we find the Boonesborough settlers entering into an "association" for a similar purpose "for their own and the public good," and making written regulations to govern the enterprise.<sup>3</sup> We shall see how, barely a dozen years later, this early introduction of the compact idea into Kentucky bore fruit.

### G. Mississippi

Later than any of these experiments was one made in the region afterward known as Mississippi. While still under British rule this region was settled by Scotch and Scotch-Irish<sup>4</sup> who found the gov-

<sup>1</sup> See the resolution reprinted in Ranck's "Boonesborough," *Filson Club's Publications*, No. 16 (Louisville, 1901), 253.

<sup>2</sup> *Id.* 23.

<sup>3</sup> Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 76, note, who says that the text is in the *Louisville News Letter*, July 18, 1840. Cf. Ranck's "Boonesborough," 107.

<sup>4</sup> A contemporary historian observes: "The Scotch-Irish, consisting of emigrants from the north of Ireland, descendants of Scotch parents, intermarried with the Irish, were numerous in Pennsylvania, Virginia, and North Carolina in 1775, and generally took up arms for the colonies, but many of them, finding their neighbors and friends divided, and the feeling becoming more vindictive every day, followed the British authorities into Florida, and were among the earliest and most valued settlers in the Natchez District." — Claiborne, quoted in Lowry and McArdle's "History of Mississippi," 132.

ernment of the Spaniards, when they regained control, exceedingly obnoxious; and this feeling was aggravated by the delays in evacuating after the cession to the United States. During these troubles with the Spanish government in 1797, the settlers at Walnut Hills (now Vicksburg) assembled in a mass meeting and appointed a "Committee of Safety,"<sup>1</sup> which thereupon proceeded to draft the following proposals, which were finally accepted by the governor and continued for a considerable time to regulate the affairs of the community:—

"1st. The inhabitants of the district of Natchez, who, under the persuasion that they were citizens of the United States, agreeably to the treaty, assembled and embodied themselves, are not to be prosecuted or injured on that account but to stand exonerated and acquitted.

"2nd. The inhabitants of the district above the thirty-first degree of north latitude are not to be embodied as militia, or to be called upon to aid in any military operation, except in case of Indian invasion, or the suppression of riots, during the present state of uncertainty, owing to the late treaty between His Catholic Majesty and the United States, not being yet fully carried into effect.

"3rd. The laws of Spain in the above district shall be continued, and are on all occasions to be executed with mildness and moderation; nor shall any inhabitant be transported as a prisoner out of his government on any pretext whatever. And notwithstanding the operation of the Spanish laws is here admitted, yet the inhabitants personally shall be considered as neutrals, in the present state of uncertainty.

"4th. The committee engage to recommend it to their constituents and to the utmost of their power will endeavor to preserve the peace and tranquillity of the district, and the due execution of justice."<sup>2</sup>

Other evidences of popular government and legislation appear in the same community later in the year.<sup>3</sup>

The church covenant has already been suggested<sup>4</sup> as the germ and forerunner of the popular written constitution. It is true that this distinction has been claimed for another instrument.<sup>5</sup> Even of the New England constitutions it has been said:—

"The provincial charter bridges the gulf between the Middle Ages and our times. . . . The new instrument [the Massachusetts charter of 1691], though

<sup>1</sup> Lowry and McArdle, 150; Monette, "Valley of the Mississippi" (New York, 1848), I, 527.

<sup>2</sup> Lowry and McArdle, 151.

<sup>3</sup> Id. 153.

<sup>4</sup> *Ante*, 25.

<sup>5</sup> "The germ of the written constitution is found in the Colonial Charter governments." — Davis, "American Constitutions," Johns Hopkins University Studies, III, 470. See also Fisher, "Evolution of the Constitution of the United States" (Philadelphia, 1897), Chap. II.

still in form a charter of incorporation, was in fact a written constitution of government, such as now exists in the United States. . . . Such is the history of the written constitution, from its germ in the ancient charters of the mediæval guilds, through the era of the trading company and the phase of colonial charters, down to its latest development as it now exists,— the fundamental law of the American republics.”<sup>1</sup>

But a close comparison of these two classes of instruments discloses few really common features. Both were written and some of their phraseology was similar. But these were merely formal matters. Intrinsically, in character and substance, and historically, in origin and mode of making, the two were widely different, and even represented opposing theories of government. The charter was a recital of concessions — often wrested by force or grudgingly granted as in the case of the greatest of all, Magna Charta — from a superior to an inferior. The popular constitution is an agreement among equals, deriving its force, like all pacts, from the assent of the contracting parties. The charter, therefore, marks the subjection of the people; the popular constitution evidences at once their equality and their sovereignty. No one ever thought of consulting the people before issuing a charter. It is true that in some instances, as in the case of the second charter of Rhode Island, the people, through an appeal to the crown, were able to obtain the insertion of certain desired clauses in their charter, but this was viewed entirely as a matter of grace and not as a right. The people were never invited to suggest, and much less to sanction.

Historically, the charter is of mediæval if not feudal origin; an appendage of monarchy or at least of oligarchy.<sup>2</sup> The popular constitution, on the other hand, is a product of recent times, accompanying the advanced stages in the rise of democracy. No despot ever sanctioned a popular constitution,<sup>3</sup> but most of the American colonial charters were granted by monarchs who were notorious reactionaries in their claims of absolute and irresponsible power.

<sup>1</sup> Brooks Adams, “The Embryo of a Commonwealth,” *Atlantic Monthly*, LIV, 615, 616.

<sup>2</sup> “The charter of a mediæval town was a kind of written contract by which the town obtained certain specified immunities or privileges from the sovereign or from a great feudal lord, in exchange for some specified service which often took the form of a money payment. It was common enough for a town to buy liberty for hard cash, just as a man might buy a farm.” — Fiske, “Civil Government” (Boston, 1890), 188, 189.

<sup>3</sup> The Napoleonic plebiscites were not exceptions; they were rather attempts to obtain the appearance of popular assent without its reality.



The social contract theory, after many vicissitudes, thus came to play an important part in American constitutional development. As an explanation of the origin of society it has long been discarded; but as a working political theory it was a reality among certain of the American colonists. Turner says of the Southern Scotch Presbyterian ministers that they "preached not only the theology of Calvin, but the gospel of the freedom of the individual, and the compact theory of the state."<sup>1</sup> And this was true in all the Calvinistic communities both North and South, for these men learned the social contract theory, not from the works of Locke and Rousseau, but from theological treatises and from practical application in their church affairs.

The political instruments of the Calvinists were the first, in all modern history at least, to receive the assent of the people, and those of America were the only ones which could furnish a model for the *popular* state constitution. Without these covenants and compacts we might still have had written constitutions (for the charter did accustom the people to limitations upon legislatures and officers) but there is no probability that they would have been popular ones. They would doubtless have been mere academic declarations proclaimed by a select few without the consent or participation of the people, like the early constitutions of the states which were not influenced by the Calvinists, or like the constitutions of most European states to-day. It was through the covenant that the idea of popular assent, which was such an essential feature of that instrument, was introduced or at least preserved, and with this important truth in mind let us follow the transition from covenant to constitution.

<sup>1</sup> "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 73.

## B

### POPULAR CONSTITUTION-MAKING IN THE UNITED STATES

#### CHAPTER IX

##### I. ORIGIN AND DEVELOPMENT

##### INSTRUMENTS OF THE REVOLUTIONARY ERA

##### THE FIRST YEARS

##### A. *Introductory*

THE original American state constitutions were framed in accordance with the advice of the Continental Congress in the early years of the Revolutionary War. This advice was given in response to an inquiry from the Massachusetts Provincial Congress in May, 1775, which was followed by similar requests from New Hampshire, Virginia, and South Carolina. To the first the Continental Congress recommended the election of a general court and councillors and to the others the establishment of

"such form of government as in their judgment will best promote the happiness of the people and most effectually secure peace and good order in their colony during the continuance of the dispute with Great Britain."<sup>1</sup>

These first constitutions make their appearance in the historic year, 1776, when such instruments were framed and put into force without popular ratification in New Hampshire, South Carolina, Virginia, New Jersey, Delaware, Pennsylvania, North Carolina, and Maryland. Not only were all of these adopted without submission, but in no state, except Delaware, were delegates elected to a convention for the express purpose of framing a constitution.<sup>2</sup>

The conditions of the period which witnessed the adoption of

<sup>1</sup> See Thorpe, "Constitutional History of the American People" (New York and London, 1898), I, 110; Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), secs. 127 *et seq.*

<sup>2</sup> Thorpe, "Constitutional History" (New York and London, 1898), I, 119.

those early instruments were not favorable to the employment of approved modern methods of constitution-making.<sup>1</sup> It was a time of turmoil and excitement, and the speediest and simplest plan of putting the new instruments in force was the one sought. Indeed, the presence of a large Loyalist party in many of the states convinced the leaders of the Revolution that a reference of the constitutions to the people would be unsafe.<sup>2</sup>

Again, the prevailing political sentiment of that day was yet aristocratic. We are not to confound the cry of no taxation without representation and the clamor for self-government with a genuine desire for the rule of the masses. That ideal, even theoretical, was for the most part still some distance in the future.

Finally, and perhaps foremost among the causes which led to the enactment rather than submission of all the constitutions of the first two years of American independence, was the fact that the new instruments were generally regarded as temporary in character, and as having, at most, the force of ordinary legislative acts.

Thus it was that these first constitutions were framed and put into effect, "by the existing provincial assemblies or by conventions called for the express purpose, and were not submitted to the people for ratification."<sup>3</sup>

Yet it would be a great mistake to suppose that popular ratification was not thought of at this time. Indications are ample that the colonial lessons in popular law-making awaited only a favorable opportunity for application. Let us notice as we proceed how these indications, like popular legislation itself, are mainly confined or traceable to those localities where the influence of the Calvinist and his descendants was paramount.

### *B. New Hampshire*

While the distinction has been claimed for other colonies, New Hampshire seems to have been the pioneer in adopting a constitu-

<sup>1</sup> "It is clear enough now that the normal procedure would have been for the Assembly in each colony to provide for the election of delegates to a constitutional convention which should formulate a plan of government, and submit it to the qualified electors. If approved by them it should become the supreme law of the state. This procedure, however, was almost out of the question in most of the colonies." Thorpe, I, 121.

<sup>2</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), secs. 489, 490.

<sup>3</sup> Morey, "The First State Constitutions," *Annals of the American Academy of Political and Social Science*, IV, 218, 219.

tion.<sup>1</sup> The provincial congress, the body which directed the revolution in that colony, — assembled at Exeter on May 17, 1775,<sup>2</sup> having been chosen for six months only. Before the expiration of its term, application was made to the Continental Congress for advice as to a form of government,<sup>3</sup> with the result already stated.<sup>4</sup>

Pursuant to the recommendations thus obtained, the New Hampshire body provided for the calling of a fifth provincial congress, under a new plan for representation of the towns, and empowered it "to Prosecute such measures as they may deem Necessary for the Publick good During the Term of one year."<sup>5</sup> Convening on December 21, 1775,<sup>6</sup> this congress voted two weeks later to "take up civil government for this colony,"<sup>7</sup> and thereupon adopted an instrument reciting the grievances against Great Britain and providing for a legislative government with a popular branch and a council selected by it.<sup>8</sup>

<sup>1</sup> "It is among the many good things of which New Hampshire may be proud, that she was the first State in the Union to establish a written constitution. This honor, has, indeed, been claimed for another state. 'Virginia,' says Mr. Jefferson, 'was not only the first of the states, but, I believe I may say, the first of the nations of the earth, which assembled its wise men peaceably together, to form a fundamental constitution, to commit it to writing, and place it among its archives, where every one should be free to appeal to its text.' A reference to dates shows, at once, the incorrectness of this statement. The first Virginia constitution bears the date of June twelfth, 1776; that of New Hampshire went into operation more than five months earlier, January fifth, 1776. The constitutions of the other states were all formed at a later period, so that New Hampshire has the merit of having first set the example to the other states of a written constitution." — Plumer, "The Constitution of New Hampshire," *The Historical Magazine* (Morrisania, N.Y., 1868), N. S. IV, 172, 173.

The New Hampshire constitution "is claimed and understood to be the first that was adopted in any State or Colony in the Union." New Hampshire State Papers, edited by Bouton (Concord, 1874), VIII, preface. See also New Hampshire Town Papers (Concord, 1875), IX, Appendix, 833, by the same editor. But see *post*, 142. Still another claims the distinction. "South Carolina was the first of the United Colonies that formed an independent constitution." — Ramsey, "History of South Carolina" (Charleston, 1809), I, 267. But the South Carolina provincial congress appears not to have completed and proclaimed its constitution until March 26, 1776. Vide Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 133.

<sup>2</sup> See its *Journal*, New Hampshire Provincial Papers (edited by Bouton, Nashua, 1873), VII, 468 *et seq.*

<sup>3</sup> Belknap, "History of New Hampshire" (Boston, 1791), II, 397. Cf. *ante*, 137.

<sup>4</sup> *Ante*, 137. Cf. State Papers (edited by Bouton, Concord, 1874), VIII, 1, 2.

<sup>5</sup> New Hampshire Provincial Papers (Nashua, 1873), VII, 659 *et seq.*

<sup>6</sup> *The Historical Magazine* (Morrisania, N.Y.), N. S. IV, 145.

<sup>7</sup> New Hampshire State Papers (Concord, 1874), VIII, 2; XIV, 172.

<sup>8</sup> Id. VIII, 2, 4, where this constitution is printed in full; also *The Historical Magazine* (Morrisania, N.Y., 1868), XIV, 145 *et seq.*

There seems to be no record of any proposal before the congress to submit this instrument to the electors or of any discussion as to the right or expediency of so doing. We have seen that New Hampshire's experience in popular legislation was less extensive than that which prepared her sister colonies of southern New England for the direct participation of the people in constitution-making. Moreover, there had been no instance yet of a popularly adopted state constitution in America. Massachusetts had not initiated the movement which was to prove so fruitful of results and so instructive to the other colonies, and no example could be found elsewhere.

But perhaps the strongest reason why this instrument was not referred to the people was the fact that it was believed to be only temporary in character. It purported to be merely "A FORM OF GOVERNMENT to Continue During the Present Unhappy and Unnatural Contest with Great Britain,"<sup>1</sup> and its framers declare that they "Shall Rejoice if Such a reconciliation between us and our Parent State can be Effected as shall be Approved by the CONTINENTAL CONGRESS."<sup>2</sup>

Indeed, no less than twelve delegates protested against its adoption at all, "because it appears to us too much like setting up an independency of the mother country," and "because the colonies of New York and Virginia, which are much larger and more opulent, and, we presume, much wiser, have not attempted anything of this kind; nor, as we can learn, ever desired it."<sup>3</sup> Since, then, this instrument was expected to remain in force for perhaps but a few months, it may well be understood how it was not deemed of sufficient importance to require a submission to the electorate. Ordinary statutes might seem to the delegates to present stronger claims for such action. When the men of New Hampshire become convinced that a permanent new constitution is necessary, we shall find them adopting a different course. This pioneer of American constitutions went into force without the direct assent of the people because the times were not ripe at the beginning of the year 1776 for applying the plan of popular ratification in New Hampshire. But the conditions nevertheless existed which were to insure its early employment.

<sup>1</sup> New Hampshire State Papers, VIII, 2.

<sup>2</sup> Id. 3.

<sup>3</sup> Quoted in Plumer, "The Constitution of New Hampshire," *The Historical Magazine* (Morrisania, N.Y., 1868), XIV (IV, new ser.), 173.

### C. *South Carolina*

As in New Hampshire, so in the next colony to act, the first effort at constitution-making was regarded as provisional and temporary. The provincial congress, having declared itself "the General Assembly of South Carolina," proceeded to adopt an instrument framed on the model of the British constitution and to continue "till a reconciliation between Great Britain and the colonies should take place."<sup>1</sup> After the revolution was well under way, however, and it came to be understood that reconciliation was not to be expected, steps were taken for a more permanent constitution. A new legislature was chosen in the fall of 1776 and there seems to have been a general understanding that it was to undertake this task, and its action was therefore regarded as an authorization direct from the people.<sup>2</sup>

When this body met in the following January, it furnished evidence, — the first, probably, among the organized colonies during this entire period — that the popular compact-making of colonial times<sup>3</sup> had not been altogether forgotten. Unlike the New Hampshire congress this South Carolina body did not declare in force the results of its work, "it submitted them for the space of a year to the consideration of the people at large."<sup>4</sup> There was no actual vote on the instrument, but

"from the general approbation of the inhabitants, the new Constitution received all the authority which could have been conferred on the proceedings of a convention expressly delegated for the express purpose of framing a form of government."<sup>5</sup>

Doubtless a strong reason why a formal submission to a popular vote was not at least proposed was that "the distinction between a constitution and an act of the legislature was not at this period so well understood as it has been since."<sup>6</sup> As we shall find was the case also in Virginia, the opinion prevailed that a constitution was a mere act of the legislature. So strong, indeed, was this opinion that almost a half century later it received judicial sanction with reference

<sup>1</sup> Ramsey, "History of South Carolina" (Charleston, 1809), I, 269. Cf. II, 135.

<sup>2</sup> Id. II, 135; Ramsey, "History of the Revolution in South Carolina," 128, 129. But see Judge Jameson's criticism of this view, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 137.

<sup>3</sup> See *ante*, III *et seq.*

<sup>4</sup> Ramsey, "History of the Revolution in South Carolina," 128, 129.

<sup>5</sup> Id. <sup>6</sup> Ramsey, "History of South Carolina, II, 135.

to both of the above mentioned instruments from the highest court of the state, which declared:—

“Between the declaration of our National Independence and the adoption of the federal constitution, this state was sovereign and uncontrolled. The people, in whom all power was vested, thought proper to employ the legislature as their agents, in the exercise of that power. In the use of this power, the legislature was unlimited. They were the representatives of the people; for all purposes whatever could be done by the people, could be done by the legislature. Each succeeding legislature possessed the same power, and could not be bound by any act of a preceding legislature, for each legislature was the people. Whatever, therefore, one legislature could enact, a succeeding legislature could repeal. The form of government adopted by the legislature of 1776, was no more than any other legislative act, and was subject to the revision and repeal of a succeeding legislature. The legislature of 1778, did revise and repeal the act of 1776, and adopted another form of government which is called the constitution of 1778. This constitution pretends to no control over succeeding legislatures, although it does restrain the officers of government in the exercise of the powers vested in them for the administration of the laws. Had it attempted to restrain future legislatures, it would have been inoperative; as each legislature possessed all the power of the people, who can undo whatever they may have done.”<sup>1</sup>

But the fact that this second South Carolina instrument was left “to the consideration of the people” even without a vote shows that the struggles of the Carolina covenant-makers and “associations” earlier in the eighteenth century had not been altogether in vain.

#### *D. Virginia*

##### *1. “The First Complete Constitution”*

The third colony to take steps toward the framing of a constitution and the first to accomplish that result in anything like modern completeness was Virginia.

“It has been usual to concede to Virginia,” says Judge Jameson,<sup>2</sup> “the honor of having framed the first American Constitution. If by that be meant the first which was complete according to later ideas of what a Constitution should be, the concession is just. The first Constitutions of New Hampshire and South Carolina, which were several months earlier in date than that of Virginia, were very imperfect, while the latter was so skilfully framed that it was not found necessary to change it until 1830, nearly three quarters of a century after its formation.”

<sup>1</sup> Per Huger, J., in *Thomas v. Daniel*, 2 McCord (S.C.), 359\*.

<sup>2</sup> “Constitutional Conventions” (4th Ed., Chicago, 1887), sec. 138, note.

But the body which framed this instrument was not, as afterward in Massachusetts and New Hampshire, created for that purpose in response to a demand of the people expressed through the ballot-box. It was not even charged with the duty or expressly vested with the power of establishing a constitution at all.<sup>1</sup>

"For more than a year," observes a recent historian,<sup>2</sup> "local committees, self-constituted, acting as revolutionary bodies, and therefore under no laws or general system, had exercised what functions of defence, and too often of offence, were deemed necessary by a majority of their members, governed only by the rules of self-preservation. From these local committees grew the Colonial Convention, convening without definite aim or purpose, and containing within itself a difference of opinion that promised a protracted contest on every question that involved a change in the social order of the colony."

How this body came into existence is also described by Jefferson. The ancient House of Burgesses had been dissolved by the royal governor, Lord Dunmore, in 1775.<sup>3</sup>

"On the discontinuance of assemblies, it became necessary to substitute in their place some other body, competent to the ordinary business of government, and to the calling forth the powers of the State for the maintenance of our opposition to Great Britain. Conventions were therefore introduced, consisting of two delegates from each county, meeting together and forming one house, on the plan of the former house of burgesses, to whose places they succeeded. These were at first chosen anew for every particular session. But in March, 1775, they recommend to the people to choose a convention which should continue in office a year. This was done, accordingly, in April, 1775, and in the July following that convention passed an ordinance for the election of delegates in the month of April annually. It is well known that in July, 1775, a separation from Great Britain and establishment of republican government had never yet entered into any person's mind. A convention, therefore, chosen under that ordinance, cannot be said to have been chosen for the purposes which certainly did not exist in the minds of those who passed it. . . . So that the electors of April, 1776, no more than the legislators of July, 1775, not thinking of independence and a permanent republic, could not mean to vest in these delegates powers of establishing them, or any authorities other than those of the ordinary legislature."<sup>4</sup>

We shall see how different this was from the painstaking effort subsequently made in Massachusetts to ascertain and carry out the

<sup>1</sup> "Writings of Thomas Jefferson" (Washington's Ed., New York, 1854), VIII. 363.

<sup>2</sup> Worthington C. Ford in *The Nation*, LI, 107.

<sup>3</sup> See remarks of Judge Tucker in *Kemper v. Hawkins*, 1 *Virginia Cases*, 70.

<sup>4</sup> "Writings of Thomas Jefferson" (Washington's Ed.), VIII. 363, 364.



popular will. The latter was in accord with the democratic ideas of Jefferson and he urged that without this authorization from the people the convention could not proceed to adopt a form of government. Says Edmund Randolph:<sup>1</sup>—

“Mr. Jefferson, who was in Congress, urged a youthful friend in the convention to oppose a permanent constitution until the people should elect deputies for the special purpose. He denied the power of the body elected (as he conceived them to be agents for the management of the war) to exceed some temporary regimen.”

Nevertheless the body thus chosen was distinguished for the high character of its membership. “No other convention,” says Thorpe, “assembled to make a State constitution has enrolled so many eminent men.”<sup>2</sup> The delegates assembled at Williamsburg on May 6, 1776, having been elected in the preceding month.<sup>3</sup>

On June 12, they proceeded to adopt the Declaration of Rights, which had been drafted by George Mason and which is noted for its clear expression of advanced political doctrines.<sup>4</sup> By June 29 they had agreed upon a “constitution or form of government,” which seems to have been considered apart from the Declaration of Rights.<sup>5</sup> This instrument, as has been observed, was the first complete American constitution. It is distinguished also as containing the first enactment of the doctrine of the separation of governmental powers,<sup>6</sup>—a feature made pertinent in Virginia by the fact that under the colonial *régime* judges had seats in the legislature. Both the Declaration and the form of government were agreed upon unanimously by the delegates,<sup>7</sup> and yet among all that brilliant array there seems to have been only one who thought it necessary or desirable that the results of the convention’s labors be submitted to the people.

<sup>1</sup> Ms. “History of Virginia,” 63, quoted in writings of Thomas Jefferson (Ford’s Ed., New York, 1893), II, 9.

<sup>2</sup> “Constitutional History of the American People” (New York, 1898), I, 117, note.

<sup>3</sup> See “Proceedings of the Convention” (Richmond, 1816, reprint). Cf. Grigsby, “The Virginia Convention of 1776” (Richmond, 1855).

<sup>4</sup> See text in Hening’s “Statutes at Large” (Richmond, 1821), IX, 109.

<sup>5</sup> Id. 112.

<sup>6</sup> Bondy, “The Separation of Powers” (New York, 1896), Columbia University Studies, V, No. 2, 19, note 4.

<sup>7</sup> See Hening’s “Statutes at Large,” IX, 109, 112.

## 2. *Jefferson's Plan for Popular Ratification*

Thomas Jefferson, though elected to this convention,<sup>1</sup> was also a member of the Continental Congress, and was absent in attendance upon the latter during the deliberations of the Virginia body. But the great American exponent of the democratic theory in the eighteenth century did not allow his absence to preclude him from presenting his ideas to the convention. Writing subsequently of this occasion he says:—

"I was then at Philadelphia with Congress; and knowing that the Convention of Virginia was engaged in forming a plan of government, I turned my mind to the same subject, and drew a sketch or outline of a Constitution, with a preamble, which I sent to Mr. Pendleton, president of the convention, on the mere possibility that it might suggest something worth incorporation into that before the Convention. He informed me afterwards by letter, that he received it on the day on which the Committee of the Whole had reported to the House the plan they had agreed to; that that had been so long in hand, so disputed inch by inch, and the subject of so much altercation and debate, that they were worried with the contentions it had produced, and could not, from mere lassitude, have been induced to open the instrument again; but that, being pleased with the Preamble to mine, they adopted it in the House, by way of amendment to the Report of the Committee; and thus my Preamble became tacked to the work of George Mason."<sup>2</sup>

Jefferson had all along denied the power of this Virginia body to enact a permanent constitution. Then and afterwards he maintained that the instrument thus framed was of no higher force than an ordinary statute and hence repealable by the legislature.<sup>3</sup> Accordingly, he speaks of his "outline" or draft of a constitution as a "bill," but he nevertheless intends that it shall be submitted to the electors; for the instrument closes with the significant provision:<sup>4</sup>—

"It is proposed that the above bill, after correction by the Convention, shall be referred by them to the people to be assembled in their respective counties; and that the suffrages of two-thirds of the counties shall be requisite to establish it."

Nor does his insistence of the direct participation plan end here. His proposed constitution also provides:<sup>5</sup>—

<sup>1</sup> Thorpe, "Constitutional History" (New York, 1898), I, 117, note.

<sup>2</sup> "Writings of Jefferson" (Ford's Ed., New York, 1893), II, 8, 9, notes. Both the original draft and the first copy are set out in full in the volume cited.

<sup>3</sup> Id. (Washington's Ed., New York, 1854), VIII, 363, 364.

<sup>4</sup> Id. (Ford's Ed., New York, 1893), II, 29, 30.

<sup>5</sup> Id. 29.

"None of these fundamental laws and principles of government shall be repealed or altered, but by the personal consent of the people on summons to meet in their respective counties on one and the same day by an act of the Legislature to be passed for every special occasion; and if in such county meetings the people of two-thirds of the counties shall give their suffrage for any particular alteration or repeal referred to them by the said act, the same shall be accordingly repealed or altered, and such repeal or alteration shall take its place among these fundamentals and stand on the same footing with them, in lieu of the article repealed or altered."

Thus the plan of popular ratification, both of the original instrument and of its amendments, was brought before the convention; but in vain. It seems not to have been even discussed. Indeed, after it was received, there was little opportunity for discussion. And if it had been debated, there is small likelihood that the result would have been different. The experience of Virginia had not been such as to render it favorable soil for such an experiment. The delegates who framed this instrument represented a tidewater people of English stock. The Scotch-Irish, who had begun to settle in the western mountains, had little or no voice in its proceedings, though they appear to have sent a communication to it.<sup>1</sup>

Jefferson, as we have seen, not only opposed the enactment of the constitution, but insisted that it was never anything more than an ordinary enactment of the legislature and therefore subject to repeal.<sup>2</sup> These views were subjected to a judicial test a few years later (1793) in a case which came before the General (Supreme) Court of Virginia.<sup>3</sup> The General Assembly had passed an act conferring upon the district courts the powers of a court of chancery in reference to granting injunctions. This was in conflict with the provisions of the constitution, and the question was thus squarely presented as to whether the latter instrument was an ordinary statute or was a real constitution. If the former, the act in question would stand, as it would effect a repeal of the earlier one; if the latter, the statute was invalid, as a constitution could not be changed by a mere act of the legislature. In rendering their decision the judges repudiated the views of Jefferson and were unanimously of the opinion that the instrument proclaimed by the convention of 1776 was a real and

<sup>1</sup> See Turner, "Western State-Making in the Revolutionary Era," *American Historical Review*, I, 76; *ante*, 130.

<sup>2</sup> "Writings of Jefferson" (Washington's Ed., New York, 1854), VIII, 363-367.

<sup>3</sup> *Kemper v. Hawkins*, 1 Virginia Cases, 20.

valid constitution. Some of their opinions bear directly on the subject of this treatise and are of great interest as the earliest expressions of judicial thought on the now burning question whether the electors have a right to pass on a newly framed constitution. Thus Mr. Justice Nelson says:<sup>1</sup> —

“It is confessedly the assent of the people which gives validity to a constitution.

May not the people then, by a subsequent acquiescence and assent, give a Constitution, under which they have acted for seventeen years, as much validity, at least *so long as they acquiesce* in it, as if it had been previously expressly authorized?

The people have received this as a Constitution. The magistrates and officers, down to a constable (for even the mode of *his* appointment is directed) have been appointed under it.

The people have felt its operation and acquiesced.

Who then can change it? I answer, the PEOPLE alone.”

Some of this reads as though the learned judge was favorable to the democratic practice of New England. But this must be construed in the light of the fact that he upheld an instrument which the people, as a whole, neither initiated nor ratified.

What the phrase “assent of the people” meant to the Virginians of 1793 is best revealed in the opinion in the same case of Judge Tucker, who speaks<sup>2</sup> of constitutional conventions as

“bodies neither authorized by, or known to, the then constitutional government; bodies, on the contrary, which the constitutional officers of the then existing government considered as illegal, and treated as such. Nevertheless, they met, deliberated and resolved for the *common good*. They were the *people* assembled by their deputies; not a *legal*, or a *constitutional assembly* or *part* of the *government* as then organized. Hence they were not, nor could be deemed the ordinary legislature; that body being composed of the governor, council and burgesses, who sat in *several distinct chambers* and *characters*; while the other was composed of a *single* body, having neither the character of governor, council, or legitimate representative among them; they were, in effect, *the people themselves*, assembled by their delegates, to whom the care of the commonwealth was especially, as well as unboundedly confided.”

Here, then, we have a clear statement of the “representation” theory in constitution-making. It is a theory of which we shall hear much in the future, and was for a long time, and even yet is, advanced in order to check the steady trend toward the method of direct participation by the people. The latter, which had received *quasi*-recogni-

<sup>1</sup> *Kemper v. Hawkins*, 1 *Virginia Cases*, 28.

<sup>2</sup> *Id.* 69.

tion in South Carolina, and was soon to be demanded by a considerable element in North Carolina, existed as yet, only in the form of a proposal in Virginia, — a proposal, it is true, by one of her most eminent sons, but receiving no serious consideration from the distinguished statesmen who gathered at Williamsburg to frame the first fundamental code of the state. Nevertheless there is reason to believe that this proposal was not without its influence on the constitutional development of Virginia. In the second convention which met, though more than half a century after the first, to establish a form of government for the Old Dominion, this proposed constitution of Jefferson was known to the delegates,<sup>1</sup> and the instrument which they finally evolved followed the ideas of the Sage of Monticello and went to the people for ratification.

### *E. Pennsylvania*

#### *1. The First Constitution*

As in Virginia, so in Pennsylvania, the first constitution was the immediate product of the revolutionary movement.<sup>2</sup> The English Quakers and a portion of the Germans,<sup>3</sup> who had formed a coalition, and, until lately, controlled the assembly, were inclined to favor Great Britain, and the patriotic movement was largely in the hands of the Scotch-Irish element. These were the men who took naturally to the forming of the "associations" which we have already noticed.<sup>4</sup> At a meeting of representatives from the Committee of Safety of the various counties, held in Philadelphia in June, 1776, the people were asked to elect delegates to a provincial convention —

<sup>1</sup> "I have seen the project of the constitution which Mr. J[efferson] offered, in the Council Chamber, in his own handwriting, tho' it cannot now be found, — and I have since cursed my folly that I neglected to take a copy of it." — Mr. Leigh of Halifax, in his speech on the apportionment of representatives. *Proceedings and Debates of the Virginia State Convention of 1829-1830* (Richmond, 1830), 160.

<sup>2</sup> See as to the history of this instrument an instructive article by Paul Leicester Ford on "The Adoption of the Pennsylvania Constitution of 1776," *Political Science Quarterly*, X, 426.

<sup>3</sup> This is Ford's view. But it by no means expresses the attitude of all the Germans. The writer's great-great-grandfather, who was the son of a German-Swiss immigrant, was a member of the Revolutionary Committee of Correspondence of Westmoreland County, and later a delegate to the Constitutional Convention of 1776. See "Pennsylvania Archives," III, 648 (4th series); Egle, "Pennsylvania Genealogies," 498.

<sup>4</sup> *Anle*, 107 *et seq.*

"for the express purpose of forming a new government for this province, on the authority of the people only."<sup>1</sup>

In the following July, delegates were elected and the convention met at Philadelphia and entered upon the task of framing a constitution. Of the instrument which they finally evolved it has been declared:—

"No constitution yet framed had ever made such great strides towards popular government. . . . Only by a study of the other constitutions adopted at that time can the radical character of these provisions be properly understood."<sup>2</sup>

The instrument did not provide for submission to the people and that course does not appear to have been debated. Doubtless the chief reason for this, as in some of the other colonies, was fear of the Loyalists, for it seems that the extremists in the convention realized that they were in the minority throughout the province.<sup>3</sup> But that the convention was disposed toward the principle of that plan is apparent from the following clause,<sup>4</sup> which the constitution contained:—

"To the end that laws before they are enacted may be more maturely considered and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles."

This, as Ford observes,<sup>5</sup> was "practically establishing a referendum."

The constitution was proclaimed in September, the delegates assuming "by virtue of the authority vested in us by our constituents" to "ordain, declare and establish"<sup>6</sup> it. Notwithstanding (and in some quarters, doubtless, by reason of) its ultra-democratic character, extreme dissatisfaction with the instrument was expressed.<sup>7</sup> Many of the delegates themselves refused to sign it,<sup>8</sup> and the con-

<sup>1</sup> "Conventions of Pennsylvania," 38; Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 143.

<sup>2</sup> Ford, *Political Science Quarterly*, X, 454.

<sup>3</sup> *Id.* 454, 455.

<sup>4</sup> Poore, "Charters and Constitutions," II, 1544; sec. 15.

<sup>5</sup> *Political Science Quarterly*, X, 454.

<sup>6</sup> Preamble.

<sup>7</sup> Ford, *Political Science Quarterly*, X, 455, 456.

<sup>8</sup> *Id.*; Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 45.

temporary press reports disclose that the popular disapproval of it was strong.<sup>1</sup> This state of affairs appears to have suggested the idea of consulting the people themselves regarding another convention and a new constitution.

## 2. *The Proposed Plebiscitum*

In June, 1777, the council presented the following address:<sup>2</sup>—

"To the Hon'ble, the Representatives of the Freemen of the Commonwealth of Pennsylvania in General Assembly met:

"The supreme Executive Council of the said Commonwealth beg leave to represent: That they are sorry to find the present Constitution of this State so dissatisfactory to any of the Well Affected Inhabitants thereof, and would gladly concur in any suitable and safe Measure for the removal of the uneasiness; That they are of opinion this might be greatly attained by taking the sense of the majority of the Electors throughout the Country on the important Question, Whether a Convention be holden at some proper time to reconsider the frame of government formed by the late convention; that to fix the exact mode of obtaining the mind of the majority on the subject, most properly belongs to their Representatives; that the council hope that if some suitable mode of advising and getting the people at large to declare themselves, and if this were advised and published at this time, great ease and relief would be thereby given to some persons who are dissatisfied as aforesaid; and that unanimity in the common cause, so necessary at this time, will be promoted.

"By Order of the Council,

"Thomas Wharton, Jun. President.

"Council Chamber, Philad'a June 11th, 1777."

The Whig society, which was in favor of the existing constitution, petitioned the assembly in case any change should be contemplated, to "take the necessary steps for collecting the sense of the State previous to any such recommendation."<sup>3</sup> Accordingly, on June 12, 1777, the assembly, which then constituted the only branch of the legislature in Pennsylvania, adopted a resolution to

"recommend it to the inhabitants of the Commonwealth to give their sense of the present dispute respecting the calling of a Convention."<sup>4</sup>

A committee of the assembly appointed to recommend a method of submitting the proposition, reported a plan which was adopted for the election by the people in their townships and other local units of commissioners whose functions were prescribed as follows:—

<sup>1</sup> *Pennsylvania Packet*, February 26, 1779.

<sup>2</sup> "Colonial Records of Pennsylvania," XI, 220.

<sup>3</sup> Oberholtzer, "The Referendum" (2d Ed., New York, 1900), 50.

<sup>4</sup> *Id.*

"To go to the house or place of residence of each and every freeman entitled to vote for members of General Assembly within their respective townships, boroughs, wards or districts, or to take some other opportunity of meeting with them. The said commissioner shall ask each and every of the said freemen whether he desires that a convention be now called, and the freemen shall give in writing on a scroll or piece of paper, his vote or answer, which he shall put into a box provided for that purpose, which he shall keep shut and in his own possession, and return the same on or before the tenth day of November to the sheriff of the city or county to which he belongs, or in case of the death, sickness or absence of the sheriff, to the coroner, who, with the assistance of the said commissioner, shall examine the said box or bag, and cast up the number of votes therein contained on each side of the question, and the sheriff or coroner shall deliver to such commissioner a certificate of the said numbers, and also return a true account thereof, under the hands and seals of the said sheriff or coroner, and of the said commissioner, to the next General Assembly at their first sitting."<sup>1</sup>

The British invasion suspended, for more than a year, further attempts to carry out this plan; but these were resumed after the evacuation, and on November 28, 1778, the assembly adopted the following resolution:—

"That the people throughout this State qualified to vote for members of Assembly, do meet at the usual places of election since the late happy revolution, on the 25th day of March next, and choose judges and inspectors as by law directed in case of representatives. And the said judges and inspectors being so chosen and sworn as at the election of representatives, shall provide two boxes for the city and each district of every county; and on the first Tuesday in April next they shall receive the votes of the freemen qualified at the time of said election by law, to vote as aforesaid, making at the same time a list of the voters' names, and put into one box all the votes for and against a convention, the voters in favor of a convention writing on their tickets, 'For a Convention' and those against it 'Against a Convention,' and in the other box they shall put the votes for the members of such convention as that, if the majority of votes should be in favor of a convention, the minority may not be precluded from a choice in the persons who are to compose it, or the people put to the inconvenience of a second meeting."<sup>2</sup>

These boxes, after the meeting had adjourned, were sealed and delivered by the election officers at the court houses of the respective counties to the sheriffs who would then take them up to the Assembly where the boxes would be opened and the ballots counted.<sup>3</sup>

<sup>1</sup> Journals of the Assembly of Pennsylvania, 145.

<sup>2</sup> Id. 246, 247.

<sup>3</sup> Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 52, note 12.



"If a majority of votes shall appear to be against a convention, then no further proceedings shall be had, but if a majority of votes shall be for a convention, the Assembly shall then proceed to open the boxes containing the names of the members for the city and county, and shall declare the six highest in number from each city and county to be the members to represent the said city and county in convention."<sup>1</sup>

Meanwhile, however, the opponents of the new constitution had been at work with good effect. Such formidable remonstrances were presented to the assembly that before the question could be voted on that body adopted a resolution rescinding the former one,<sup>2</sup> and the first movement for a popularly initiated constitution in Pennsylvania came to an end.

#### *F. North Carolina*

On August 9, 1776, the Council of Safety, meeting at Halifax, North Carolina, and which was the guiding body of the revolution in that state, resolved:—

"That it be recommended to the good people of this now Independent State of North Carolina to pay the greatest attention to the Election to be held on the fifteenth day of October next, of delegates to represent them in Congress, and to have particularly in view this important Consideration: That it will be the Business of the Delegates then Chosen not only to make Laws for the good Government of, but also to form a Constitution for, this State; that this last as it is the Corner Stone of all Law, so it ought to be fixed and Permanent, and that according as it is well or ill Ordered it must tend in the first degree to promote the happiness or Misery of the State."<sup>3</sup>

There was thus in North Carolina, more even than in its neighbor of the south, a *quasi*-submission of the question whether a constitution should be adopted, and if so what would be its character and provisions. For it was placed within the power of the voters to determine both of these questions by instructing their representatives. Events proved that in some localities, at least, the people were not slow to exercise this power, and it is only what might have been expected that among these were the counties of Mecklenburg and Orange where the Scotch-Irish had settled in large numbers, where the Regulators' movement had its origin and the covenants had flourished and whence, yet more recently, had emanated the famous

<sup>1</sup> Journal of the Assembly of Pennsylvania, 246, 247.

<sup>2</sup> Id. 323, 324.

"Colonial Records of North Carolina" (Raleigh, 1890), X, 996.

resolves of 1775. In the first-named county the record opens as follows:—

"At a general Conference of the inhabitants of Mecklenburg assembled at the Court-house on the first of November, 1776, for the express purpose of drawing up instructions for the present Representatives in Congress, the following were agreed to by the assent of the people present and ordered to be signed by John M. Alexander, Chairman chosen to preside for the day in said Conference."<sup>1</sup>

Following this is a series of instructions elaborate in detail and explicit in tone, relating not alone to the constitution about to be framed, but also to general legislation thereafter to be enacted.<sup>2</sup> The representatives are instructed that the government they are to establish must be a simple democracy or as near it as possible,<sup>3</sup> and certain time-honored political maxims are recited for incorporation in the Bill of Rights.<sup>4</sup> In places the strong religious bias of the constituents crops out, as where they direct that no Romanist or unbeliever shall be eligible to office.<sup>5</sup> But the passage most significant in this connection is the following:—

"You shall endeavor that the form of Government when made out and agreed to by the Congress shall be transmitted to the several counties of this State to be considered by the people at large for their approbation and consent if they should choose to give it to the end that it may derive its force from the principal supreme power."<sup>6</sup>

The same idea underlies the thirteenth section where certain legislation is authorized "after the form of government should be agreed to by the people."<sup>7</sup> The principle of popular ratification is employed in the meeting of the constituents themselves, for the instructions, it appears, were drawn up by one Colonel Avery and John M. Alexander and three of them "were rejected by the people."<sup>8</sup> This John M. Alexander, who was the scion of a Scotch-Irish family of Maryland,<sup>9</sup> had been prominent in the Mecklenburg convention, and he and his fellow constituents were but making concrete application of hereditary political ideas. Had the whole state been settled by men of their race, a submission to the people would doubtless have followed as surely in North Carolina as afterward in Massachusetts and New Hampshire.

<sup>1</sup> "Colonial Records of North Carolina," X, 870 a.

<sup>2</sup> *Id.* 870 a-870 f.

<sup>3</sup> *Id.* sec. 2.

<sup>4</sup> *Id.* sec. 5.

<sup>5</sup> *Id.* sec. 19.

<sup>6</sup> *Id.* sec. 22.

<sup>7</sup> *Id.* sec. 13.

<sup>8</sup> *Id.* sec. 870 a, note.

<sup>9</sup> Hanna, "The Scotch-Irish," II, 68.

In Orange County the instructions are even more explicit, beginning as follows:—

"We, the people of the County of Orange, who have chosen you to represent us in the next Congress of Representatives delegated by the people of this State require you to take notice that the following are our instructions to you which you are required to follow in every particular with the strictest regard."<sup>1</sup>

After setting forth the usual maxims which are to be incorporated in the new instrument they proceed as follows:—

"Secondly. We require that the civil and religious constitution, which we apprehend to contain the rules whereby the inferior derived power is to be exercised, be framed and prepared by the delegates and be sent to every County to be laid before the people for their assent if the people shall think proper to give it, to the end that it may derive its authority from the principal supreme power and be afterward alterable by that alone agreeable to the fifth maxim before set down."<sup>2</sup>

Such were the ideas of these North Carolina colonists in the second year of the struggle for independence. The second recorded demand for the popular ratification of a state constitution came from the South. Does not this dispose of the claim that it was exclusively a New England notion?

The Congress to which these representatives had been elected met at Halifax on November 12 following.<sup>3</sup> It was a legislature more than a convention and its time seems to have been occupied largely in general law-making. The instrument which it framed embodied the Mecklenburg idea of confining office-holders to believers and Protestants,<sup>4</sup> but the convention failed to observe the instructions to send its work back to the people. Doubtless among the reasons for this were the strength of the Tory party and fear of the invader. But it is apparent that the greatest obstacle was the lack of more "Puritans of the South." That those who were there remained true to the traditions is evidenced by these instructions from Mecklenburg and Orange counties, and that their ideas afterward leavened the whole body politic is again evidenced by the fact that when the next constitutional change occurred in North Carolina, the amendments to the fundamental Code were *submitted to the people*.<sup>5</sup>

<sup>1</sup> "Colonial Records of North Carolina" (Raleigh, 1890), X, 870 f.

<sup>2</sup> Id. 870 g.

<sup>3</sup> See its Journal, reprinted Id. 913-1003.

<sup>4</sup> Id. 1011; Constitution, sec. XXX.

<sup>5</sup> *Post*, Chap. XIV.

## G. Georgia

Another state whose people acted upon the advice of the Continental Congress was Georgia. On October 1, 1776, a convention assembled at Savannah which devoted itself to framing an instrument which was completed and agreed to by the delegates on February 5, of the year following.<sup>1</sup> It was not submitted to the people but it contained several features which were quite advanced for that day. It provided expressly for religious liberty and the separation of church and state.<sup>2</sup> It required the establishment and maintenance of free public schools.<sup>3</sup> But the provision which most interests us here was the following: —

"No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid."<sup>4</sup>

Here was a provision, not only for popular amendment but for the initiative, — the first appearance of that system in any written constitution and its first appearance anywhere since the colonial era in New England.

In the other states which established constitutions during the year 1776, there seems to have been no movement toward popular ratification. In Maryland, as we shall see,<sup>5</sup> something of an approach to it was made in considering the federal constitution a dozen years later. But in New Jersey<sup>6</sup> and Delaware<sup>7</sup> there was no such tendency, doubtless for the same reason — that there had been no colonial experience in popular legislation. Those elements of the population which had made such an experience possible elsewhere were lacking in the states just named.

<sup>1</sup> Jameson, "Constitutional Conventions," sec. 147.

<sup>2</sup> Art. LVI; Poore, "Charters and Constitutions," I, 383.

<sup>3</sup> Art. LIV, Id.

<sup>4</sup> Art. LXIII, Id.

<sup>5</sup> *Post*, Chap. XIV.

<sup>6</sup> See the Journal of its Convention (Trenton, 1831).

<sup>7</sup> There seems to have been a close connection between the conventions of Delaware, Maryland and Pennsylvania. The former's Bill of Rights appears to have been borrowed from Pennsylvania, and to have furnished the model for the corresponding part of the Maryland instrument. See Farrand, "The Delaware Bill of Rights of 1776," *American Historical Review*, III, 641.

## CHAPTER X

### INSTRUMENTS OF THE REVOLUTIONARY ERA (*Continued*)

#### NEW YORK

THE movement for a new constitution in New York was slower than in those states whose early constitutional history we have just reviewed, on account of a strong and well organized Loyalist element in the colony.<sup>1</sup> However, on May 31, 1776, the Colonial Congress, in accordance with the advice of the Continental body,

"RESOLVED, That it be recommended to the electors in the several counties in this colony, by election in the manner and form prescribed for the election of the present Congress, either to authorize (in addition to the power vested in the Congress) their present deputies, or others in the stead of their present deputies, or either of them, to take into consideration the necessity and propriety of instituting such new government as in and by the said resolution of the Continental Congress is described and recommended; and if the majority of the counties, by their deputies in provincial congress, shall be of opinion that such new government ought to be instituted and established, then to institute and establish such a government as they shall deem best calculated to secure the rights, liberties and happiness of the good people of this colony; and to continue in force until a future peace with Great Britain shall render the same unnecessary."<sup>2</sup>

#### *Petition of "Mechanicks in Union"*

Meanwhile the Colonial Congress remained in session for another month at New York,<sup>3</sup> and during this interval an interesting event occurred which probably marks the origin of the idea of popular

<sup>1</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 150; Thorpe, "Constitutional History of the American People" (New York, 1898), I, 123, 124.

<sup>2</sup> New York Constitution of 1777, Preamble; Poore, II, 1329; 1 New York Revised Laws, 29, 31.

<sup>3</sup> Appendix to Proceedings and Debates of New York Constitutional Convention of 1821 (Albany, 1821), 691. This appendix is one of the sources for the history of the convention of 1777, as it contains a brief account of the proceedings.

ratification in the Empire State. On June 14, the "Mechanicks in Union" of New York City and County presented a petition to the Colonial Congress asking that the new frame of government, which the forthcoming Congress was to prepare, be submitted to the people for ratification. As the address embodying this petition has not, it is believed, been hitherto published in this connection and is unusually pertinent to the subject in hand, presenting the arguments for such a course viewed from an eighteenth century standpoint, it is quoted at length:<sup>1</sup>—

"Elected Delegates: With due confidence in the declaration which you lately made to the Chairman of our General Committee that you are, at all times, ready and willing to attend to every request of your 'constituents or any part of them'; we, the Mechanicks in Union, though a very inconsiderable part of your constituents, beg leave to represent that one of the clauses in your Resolve, respecting the establishment of a new form of Government is erroneously construed, and for that reason may serve the most dangerous purposes; for it is well known how indefatigable the emissaries of the British Government are in the pursuit of every scheme which is likely to bring disgrace upon our rulers, and ruin upon us all. At the same time we cheerfully acknowledge that the genuine spirit of liberty which animates the other parts of that Resolve, did not permit us to interpret it in any other sense than that which is the most obvious, and likewise, the most favourable to the natural rights of man. We could not, we never can, believe you intended that the future delegates or yourselves should be vested with the power of framing a new Constitution for this Colony, and that its inhabitants at large should not exercise the right which God has given them, in common with all men, to judge whether it be consistent with their interest to accept or reject a Constitution framed for that State of which they are members. This is the birth-right of every man, to whatever state he may belong. There he is, or ought to be, by inalienable right, a co-legislator with all the other members of that community. Conscious of our own want of abilities, we are, alas! but too sensible that every individual is not qualified for assisting in the framing of a Constitution. But that share of common sense which the Almighty has bountifully distributed amongst mankind in general, is sufficient to quicken every one's feeling, and enable him to judge rightly what degree of safety and what advantages he is likely to enjoy, or be deprived of, under any Constitution proposed to him. For this reason, should a preposterous confidence in the abilities and integrity of our future Delegates delude us into measures which might imply a renunciation of our inalienable right to ratify our laws, we believe that your wisdom, your patriotism, your own interest, nay, your ambition itself, would urge you to exert all the powers of persuasion you possess, and try every method which, in your opinion, would deter us from perpetrating that impious and frantick act of self-destruction; for as it would precipitate us into a state of absolute slavery the lawful power which till now you have received from your constituents to be exercised

<sup>1</sup> American Archives, VI, 895 *et seq.*

over a free people, would be annihilated by that unnatural act. It might probably accelerate our political death; but it must immediately cause your own.

The continual silence of the bodies which are, by election, vested with an authority subordinate to that of your House, would strike us with amazement should we suppose that, in their presence, your resolve ever was interpreted in a sense that was not favorable to the free exercise of our inalienable rights. But we, who daily converse with numbers who have been deceived by such misconception, conceive that we ought to inform you in due time that it has alarmed many zealous friends to the general cause which the United Colonies are defending with their lives and fortunes.

As the general opinion of your uprightness depends in a great measure on your explanation of that matter, and it being self-evident that the political happiness or misery of the people under your Government must be deeply affected by the measures which they may adopt in consequence of such explanation, we trust that you will receive this respectful Address with indulgence, and that all our brethren in this and the other Colonies in the Union will do us the justice to believe that it was dictated by the purest sentiments of unconfined patriotism.

The Resolve which contains the obnoxious clause already mentioned, is, together with the introduction to it, in the following words, to wit:

'And whereas doubts have arisen whether this Congress are invested with sufficient power and authority to deliberate and determine on so important a subject as the necessity of erecting and constituting a new form of Government and internal police, to the exclusion of all foreign jurisdiction, dominion, and control whatever; And whereas it appertains, of right, solely to the people of this Colony to determine the said doubts: Therefore

'Resolved, That it be recommended to the Electors in the several Counties in this Colony, by election in the manner and form prescribed for the election of the present Congress, either to authorize (in addition to the powers vested in this Congress) their present Deputies, or others in the stead of their present Deputies, or either of them, to take into consideration the necessity and propriety of instituting such new Government as in and by the said Resolution of the Continental Congress is described and recommended; and if the majority of the Counties, by their Deputies in Provincial Congress, shall be of opinion that such new Government ought to be instituted and established, then to institute and establish such a Government as they shall deem best calculated to secure the rights, liberties, and happiness of the good people of this Colony, and to continue in force until a future peace with Great Britain shall render the same unnecessary.'

We cannot forbear expressing our astonishment at the existence of the doubts alluded to in the introduction just quoted. But when, in compassion to those weak minds which give them birth, you condescend to declare that 'it appertains solely to the people of this Colony to determine the said doubts,' you have, in the spirit of the recommendations of the General Congress, demonstrated to your constituents that you will, on all occasions, warn them to destroy in its embryo every scheme which you may discover to have the least tendency towards promoting the selfish views of any foreign or domestick oligarchy. Your enemies

never can persuade people of reflection that you fully instructed the most ignorant amongst us, by such a positive declaration of our rights, for the purpose of surreptitiously obtaining our renunciation of them. Human nature, depraved as it is, has not yet and we hope never will, be guilty of so much hypocrisy and treachery.

We observe, on the contrary, that your Resolve is perfectly consistent with the liberal principles on which it is introduced; for, after having set forth what relates to the election of Deputies, you recommend to the Electors, if the majority of the Counties shall be of opinion that such new Government ought to be instituted, then to institute and establish such a Government.

Posterity will behold that Resolve as the test of your rectitude. It will prove that you have fully restored to us exercise of our right finally to determine on the laws by which this Colony is to be governed; a right of which, by the injustice of the British Government, we have till now been deprived; but a forced and most unnatural misconstruction, which is artfully put upon your Resolve, has deceived many who really believe that we will not be allowed to approve or reject the new Constitution. They are terrified at the consequences, although a sincere zeal for the general cause inspire them to suppress their remonstrances, lest the common enemy should avail himself of that circumstance to undermine your authority.

Impressed with a just fear of the consequence which result from that error, we conceive it would be criminal in us to continue silent any longer; and therefore we beseech you to remove, by a full and timely explanation, the groundless jealousies which arise from a misconception of your patriotick Resolve.

As to us, who do not entertain the least doubt of the purity of your intentions; who well know that your wisdom would not suffer you to aim at obtaining powers of which we cannot lawfully divest ourselves; which, if repeatedly declared by us to have been freely granted, would only proclaim our insanity, and for that reason be void of themselves; we beg leave, as a part of your constituents, to tender to you that tribute of esteem and respect to which you are justly entitled for your zeal in so nobly asserting the rights which the people at large have to legislation, and in promoting their free exercise of those rights. You have most religiously followed the line drawn by the General Congress of the United Colonies; their laws, issued in the style of recommendations, leave inviolate in the Convention, the Committees, and finally the People at large, the right of rejection or ratification; but though it be decreed by that august body that the punishment of death shall, in some cases, be inflicted, the people have not rejected any of their laws, nor even remonstrated against them. The reason of such general submission is, that the whole of their proceedings is calculated to promote the greatest good to be expected from the circumstances which occasion their resolves, and scarcely admit the delays attending more solemn forms.

The conduct of their constituents, in this instance, clearly shows what an unbounded confidence virtuous rulers may place in the sound judgment, integrity, and moderation of a free people.

Whatever the interested supporters of oligarchy may assert to the contrary, there is not, perhaps, one man, nor any set of men upon earth, who, without the



special inspiration of the Almighty, could frame a constitution which, in all its parts, would be truly unexceptionable by the majority of the people for whom it might be intended. And should God bless any man, or any set of men, with such eminent gifts, that man or those men having no separate interest to support in opposition to the general good, would fairly submit the work to the collective judgment of all the individuals who might be interested in its operation. These, it is probable, would, after due examination, unanimously concur in establishing that constitution. It would become their own joint work, as soon as the majority of them should have freely accepted it; and, by its having received their free assent, the only characteristic of the true lawfulness and legality that can be given to human institutions, it would be truly binding on the people.

Any other concurrence in the acts of legislation is illegal and tyrannical; it proceeds from the selfish principles of corrupt oligarchy; and should a system of laws appear, or even be good in every other respect, (which is scarcely admissible,) yet it would be imperfect. It could be lawfully binding on none but the legislators themselves, and must continue in that state of imperfection which disgraces the best laws now and then made in Governments established on oligarchic principles, and deprives them of true legality.

As such is the case with Great Britain herself, it is evident that her Parliament, are so far from having a lawful claim to our obedience, that they have it not to that of their own constituents; that all our former laws have but a relative legality, and that not one of them is lawfully binding upon us, though even now, for the sake of common conveniency, the operation of most of them be, and ought to be tolerated until a new system of Government shall have been freely ratified by the co-legislative power of the people — the sole lawful Legislature of this Colony. It would be an act of despotism to put it in force by any other means; which God avert! The people, it is true, might be awed or openly forced to obey; but they would abhor the tyranny and execrate the authors. They would justly think that they were no longer bound to submit than despotism could be maintained by the same violent or artful means which would have produced its existence.

But the free ratification of the people will not be sufficient to render the establishment lawful, unless they exercise, in its fulness, an uncontrolled power to alter the Constitution in the same manner that it shall have been received. This power necessarily involves that of every district occasionally to renew their Deputies to Committees and Congresses, when the majority of such district shall think fit; and therefore without the intervention of the Executive or any other power foreign to the body of the respective electors. That right is so essential to our safety, that we firmly believe you will recommend to all your constituents immediately to exercise it, and never suffer its being wrested from them; otherwise the sensibility of our Delegates could not allow them to say that they hold their offices from the voluntary choice of a free people.

We likewise conceive that this measure will more effectually, and more speedily than any other, remove disaffected persons from all our councils, and give our public proceedings a much greater weight than they have hitherto obtained amongst our neighbours.

We never did, as a body, nor ever will, assume any authority whatsoever in the public 'transactions of the present times.' Common sense teaches us that the absurdity of the claim would not only destroy our usefulness as a body of 'voluntary associators, who are warmly attached to the cause of liberty;' but that it would likewise expose every one of us to deserved derision. At the same time, we assure your honourable House that on all occasions, we will continue to testify our zeal in supporting the measures adopted by Congresses and Committees in the prosecution of their great object—the restoration of human rights in the United Colonies. And if, at any future time, the silence of the bodies in power gives us reason to conceive that our representations may be useful, we then will endeavour to discharge our duty with propriety, and rely on publick indulgence for any imperfection which cannot affect our uprightness.

Signed by order of the Committee:

Malcom McEuen, Chairman.

Mechanicks' Hall, June 14, 1776."

### *The Convention*

The delegates chosen in accordance with the recommendations of the Colonial Congress above quoted, met at White Plains, July 9, 1776, but nothing was accomplished toward a new constitution until August 1, when a committee of which John Jay was chairman was appointed to prepare a draft.<sup>1</sup> Our accounts of the proceedings of the convention are meagre,<sup>2</sup> and it is difficult for us to ascertain what proposals may have been discussed by the members, but we know that their opportunities for effective deliberation were greatly curtailed. They were constantly harassed by fear of the enemy which by this time was in full possession of New York City. The attendance was extremely irregular—at one time only three—and the members were continually being called upon for other services to the American cause. The convention was not even able to sit continuously in one place, but "was literally driven from pillar to post," among the villages of the Hudson valley.<sup>3</sup> It is not likely, therefore, that the address of the New York radicals, quoted above, received much consideration from the delegates.

Nor is it probable that, even under more favorable conditions, the plan of submitting the new constitution to the people would have met with favor. In New York as in Virginia, the idea was not on fertile soil. Her people were without the thorough democratic school-

<sup>1</sup> Appendix to Proceedings and Debates of Convention of 1821, 691, 692.

<sup>2</sup> Some account of its work is given by Dougherty, "Constitutions of the State of New York," *Political Science Quarterly*, III, 490-495.

<sup>3</sup> Appendix to Proceedings and Debates, 692.

ing of their neighbors across the New England border, and could not be expected to take so naturally to the plan of popular ratification.

Hence it is not strange that the draft reported to the convention on March 12, 1777, and which was largely the work of John Jay, contained no provision for submitting it to the people. The convention made few changes in this draft, and on April 20, 1777, "with but one dissenting voice,"<sup>1</sup> it was proclaimed by its framers the constitution of the state. It has been said that "the instrument thus framed was at that time generally regarded as the most excellent of all the American Constitutions,"<sup>2</sup> and that it "met with general approval."<sup>3</sup> Compared with others of its day it was certainly long-lived. During forty-four years it continued substantially unchanged as the fundamental law of New York. In 1801 a convention of which Aaron Burr was president adopted certain amendments relative to the legislature and the appointing power, which it also did "ordain, determine and declare" to be in force without the formality of popular assent.<sup>4</sup> But with this exception the original instrument remained intact until the great popular uprising of the second decade of the nineteenth century. The instrument of 1777, however, was not a *popular* constitution either in substance or in the manner of its enactment, and it was this lack which eventually led to its displacement by the Constitution of 1821. It was then that the ideals of the Radicals of 1776, as formulated in their address to the Colonial Congress, were at last realized, and the democratic method of constitution-making as practised in the states founded by the Calvinists was engrafted upon the public law of the Empire State.

<sup>1</sup> Appendix to Proceedings and Debates of Convention of 1821, 692.

<sup>2</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 152.

<sup>3</sup> Thorpe, "Constitutional History of the American People" (New York, 1898), I, 126.

<sup>4</sup> Proceedings and Debates of Convention of 1821, 20, 21. Some account of this convention of 1821 is given in Hammond's "History of Political Parties in New York" (Albany, 1842), I, Chap. VI.

## CHAPTER XI

### INSTRUMENTS OF THE REVOLUTIONARY ERA (*Continued*)

#### MASSACHUSETTS

TRAINED in the efficient school of the town meeting, and strongly imbued with the democratic traditions of colonial New England, the men of Massachusetts entered upon the revolution as the leaders of the colonists in their contest with the crown. Almost at the opening of the struggle an incident occurs which indicates how deeply rooted was the principle of popular ratification in that commonwealth, and how lasting was the effect of the people's experience with direct legislation during the colonial era. The town of Ashfield, in Hampshire, adopted a series of resolves on October 4, 1776, relative to the form of government which should be established in lieu of that which the revolution had displaced, and among them is the significant though crudely expressed demand —

"that all acts Pased by the General Cort of this State Respecting the Seviral Towns Be Sent to the Sevaral Towns for thair Acceptants before they Shall be in force."<sup>1</sup>

Another indication of the democratic drift of public opinion is the pamphleteering which makes its appearance about this time. One work especially,<sup>2</sup> bearing the date 1776, takes most advanced ground regarding the form and character of a constitution, and advocates changes that were not generally effected before the middle of the succeeding century. Meanwhile the demand was growing for the displacement of the colonial charter with a new constitution.<sup>3</sup>

<sup>1</sup> Massachusetts Archives, CLVI, 131 (State House).

<sup>2</sup> "The People the Best Governors or a Plan of Government founded on the just principles of Natural Freedom." See an interesting review of this by Harry A. Cushing in *American Historical Review*, I, 284.

<sup>3</sup> See detailed sketch of this in Harry A. Cushing's "Transition from Provincial to Commonwealth Government in Massachusetts," *Columbia University Studies*, VII, 196-199.

### A. *The Rejected Constitution of 1778*

Early in June, 1776, the General Court appointed a committee of twelve to report plans for a new form of government.<sup>1</sup> Nothing substantial came of this, however, since, to quote the words of an eminent local historian,<sup>2</sup> — “the opinion was generally expressed that the subject should originate with the people who were the proper authorities to attend to this matter.” In the following September the House of Representatives, adopting a course more in harmony with the democratic tradition, requested the towns to indicate whether they would consent that the General Court should enact a constitution.<sup>3</sup> Less than half of the towns took action on this request,<sup>4</sup> but among them were some of those of Worcester County. At a convention of the committees of safety of a majority of these towns of Worcester it was resolved that it would not be proper for the General Court to enact a constitution but that —

“a State Congress, chosen for the sole purpose of forming a Constitution of Government”

should be convened for that purpose.<sup>5</sup> Concord also voted to withhold consent on the ground —

“that the supreme legislature, in their corporate capacity, were by no means the proper body to form and establish such a constitution and that a convention or congress, specially chosen, should be intrusted with the business.”<sup>6</sup>

Other towns, including Boston and Andover,<sup>7</sup> Norton and Lexington,<sup>8</sup> voted against the plan of enacting the constitution by the General

<sup>1</sup> Journal of the Massachusetts House of Representatives, June 4, 6, 1776; “Works of John Adams” (Boston, 1854), IX, 429, 442; Bradford, “History of Massachusetts” (Boston, 1825), II, 117.

<sup>2</sup> Barry, “History of Massachusetts” (Boston, 1857), III, 173.

<sup>3</sup> Journal of Massachusetts House of Representatives for September 17, 1776.

<sup>4</sup> Harding, “The Federal Constitution in Massachusetts” (New York, 1896), Harvard Historical Series, II, 6. The author thinks that this may have been due to the non-concurrence of the Council in submitting the request.

<sup>5</sup> American Archives (Washington, 1837), 5th Series, III, 867; Lincoln, “History of Worcester,” 118; Barry, “History of Massachusetts,” III, 173.

<sup>6</sup> Barry, “History of Massachusetts” (Boston, 1857), III, 173, note; Shattuck, “History of Concord,” 127, 128.

<sup>7</sup> Bradford, “History of Massachusetts” (Boston, 1825,) II, 140; Barry, “History of Massachusetts” (Boston, 1857), III, 174.

<sup>8</sup> See Jameson, “An Introduction to the Study of the Constitutional and Political History of the States,” Johns Hopkins University Studies, IV, 204 *et seq.*

Court and in favor of the convention system, and in many cases their reasons are set forth in detail. Still others favored a new constitution, but suggested other plans for its adoption.<sup>1</sup>

Notwithstanding these clear expressions of opinion, which, though emanating from a minority of the towns, came nevertheless from some of the important ones, the General Assembly, on May 5, 1777, adopted the following:<sup>2</sup> —

“Resolved, That it be, and hereby is recommended to the several towns and places in this state, empowered by the laws thereof to send members to the General Assembly, that, at their next election of a member or members to represent them, they make choice of men, in whose integrity and ability they can place the greatest confidence; and, in addition to the common and ordinary powers of representation, instruct them with full powers, in one body with the Council, to form such a Constitution of Government as they shall judge best calculated to promote the happiness of this State; and, when completed, to cause the same to be printed in all the Boston newspapers, and also in handbills, one of which to be transmitted to the Selectmen of each town, or the committee of each plantation, to be by them laid before their respective towns or plantations, at a regular meeting of the inhabitants thereof, to be called for that purpose, in order to its being, by each town and plantation, duly considered, and a return of their approbation or disapprobation to be made into the Secretary’s office of this State, at a reasonable time, to be fixed upon by the General Court; specifying the numbers present at such meeting voting for, and those voting against the same; and, if upon a fair examination of said returns by the General Court, or such a committee as they shall appoint for that purpose, it shall appear, that the said Form of Government is approved of by at least two thirds of those who are free, and twenty-one years of age, belonging to this State, and present in the several meetings, then the General Court shall be empowered to establish the same as the Constitution and Form of Government of the State of Massachusetts Bay.”

At the ensuing election “a majority of the towns in the state, it would seem, chose their representatives for the next annual session of the General Court with a special view, or at least with an implied consent, to the formation of a constitution by that body.”<sup>3</sup> Such, at

<sup>1</sup> Cushing, “Transition from Provincial to Commonwealth Government,” *Columbia University Studies*, VII, 200 *et seq.*

<sup>2</sup> Journal of Massachusetts House of Representatives for May 5, 1777. The text of this resolve is also embodied in the preamble to the rejected constitution of 1778. See Journal of First Massachusetts Constitutional Convention, Appendix, 255, 256.

<sup>3</sup> Barry, “History of Massachusetts” (Boston, 1857), III, 173, 174. Bradford says: “It is presumed the representatives would not have proceeded to prepare a constitution, unless the greater part of the towns in the state had authorized the measure. No document can be found in the secretary’s office, to determine how many towns voted for it.” — “History of Massachusetts” (Boston, 1825), II, 140, note.

any rate, appears to have been the opinion of the newly elected General Court itself, for in the preamble to the proposed constitution framed by that body it was recited that —

“the good People of this State in pursuance of the said resolution, and reposing special trust and confidence in the Council and in their Representatives, have appointed, authorized and instructed their Representatives, in one body with the Council, to form such a constitution of Government as they shall judge best calculated to promote the happiness of this State, and when completed, to cause the same to be published for their inspection and consideration.”<sup>1</sup>

Proceeding on this assumption, the new General Court, soon after it convened in May, 1777, appointed a committee of eight from the House and four from the Council to draft a new constitution.<sup>2</sup> The instrument thus framed was reported to the General Court, acting as a convention, and after considerable debate it was, on February 28, 1778, agreed upon “to be laid before the several towns and plantations in said State for their approbation or disapprobation.”<sup>3</sup>

But the members of the General Court had mistaken the temper of their constituents. For though that body had observed the democratic and traditional usage in submitting the result of its labors to the people, it had failed to take note of the strong demand for a constitution framed by a convention called specially for that purpose. The new instrument was transmitted to the towns as provided in the original resolve, and while one hundred and twenty of the towns made no returns,<sup>4</sup> the others took action at various meetings up to June 15, 1778.<sup>5</sup> The detailed criticism, often severe, of the convention's work, in the town resolves<sup>6</sup> demonstrates the thoroughness with which the sovereign people was exercising its power.

When the results of these meetings were finally reported, it was found that the proposed constitution had been rejected by a vote of ten thousand as against two thousand for its adoption, the electors of

<sup>1</sup> Constitution of 1778, Journal of First Constitutional Convention (Boston, 1832), Appendix, 256.

<sup>2</sup> Barry, III, 175.

<sup>3</sup> Journal of First Constitutional Convention (Boston, 1832), Appendix, 255.

<sup>4</sup> Barry, III, 175, note; Bradford, II, 158.

<sup>5</sup> Journal of First Constitutional Convention (Boston, 1832), Appendix, 255.

<sup>6</sup> See for some interesting examples, Cushing's “Transition from Provincial to Commonwealth Government in Massachusetts,” *Columbia University Studies*, VII, 215 *et seq.*

Boston being unanimous for rejection<sup>1</sup> and those of other towns practically so.<sup>2</sup>

While there were no doubt other reasons for this result, such as intrinsic objections<sup>3</sup> to the proposed constitution itself and the hostility of the aristocratic element which preferred the continuation of the existing government which it dominated,<sup>4</sup> still the belief that the proper method had not been followed in framing the instrument was a potent factor in bringing about its rejection. As Barry says:<sup>5</sup>—

"The opinion was still current that a convention was the proper body to decide upon a constitution for the State and that no other body could successfully discharge that duty."

Thus early did the yeomanry of Massachusetts display the effects of their colonial schooling in the real and active work of government. To them their part in the establishment of a new constitution was no perfunctory one, nor was it to be committed to others. They had settled convictions both as to what the new civic framework should be, and as to how it should come into being, and they insisted that those convictions be respected to the letter.

### *B. The Articles of Confederation*

While this movement to secure a new constitution for the commonwealth was in progress, the people of Massachusetts were being accorded still another experience in popular law-making. The Articles of Confederation, which had been agreed to by Congress<sup>6</sup> in 1777 were not, in Massachusetts, ratified merely by the legislature

<sup>1</sup> Barry, III, 175, note; Bradford, II, 158.

<sup>2</sup> E.g. Weston, where 57 were against approval and only 6 in favor. Minutes of Town Clerk, reprinted Referendum News, I, 25.

<sup>3</sup> Thorpe, "Constitutional History of the American People" (New York, 1898), I, 130; Harding, "The Federal Constitution in Massachusetts" (New York, 1896), Harvard Historical Studies, II, 6, note; Bradford, "History of Massachusetts" (Boston, 1825), II, 158, 159; Hobart, "History of Abington," 136. A pamphlet was issued at Newburyport setting forth, in eighteen articles, the defects of the proposed constitution. Barry observes:—

"The objections to this instrument were, that it contained no declaration of rights, which was an essential defect; that the principle of representation was unequal, inasmuch as even the smallest towns were allowed to have one representative, and others unless containing three hundred polls, were confined to that number; and that the powers and duties of the legislators and rulers were not clearly and accurately defined." (III, 175.)

<sup>4</sup> Smith, "History of Pittsfield," I, 357.

<sup>5</sup> III, 176.

<sup>6</sup> Jameson, "Constitutional Conventions," sec. 159; Schouler, "Constitutional Studies," Pt. II, Chap. III.



as in most of the other colonies.<sup>1</sup> The General Court, following the same plan as in the then pending state constitution, submitted to the electors the question whether these Articles were to become the law of the land, and here again the electors did not stop at any halfway exercise of what they considered their prerogatives,<sup>2</sup> nor did they, as a rule, confine themselves to merely accepting or rejecting as in the case of the later French plebiscites.<sup>3</sup> They were not slow to point out features which met their disapproval and to suggest amendments and changes in the Articles. Some of these suggestions are curiously significant of the intense interest in civic affairs manifested by these rude townsmen as a result of their experience in practical self-government. Thus the people of historic Lexington recommended that the states retain the power of offering amendments to Congress.<sup>4</sup> The town of Bridgewater gave as its judgment that all questions before Congress ought to be decided by at least eleven states.<sup>5</sup> The voters of Amesbury thought that a change should be made in the fiscal arrangements of the confederation, so that its expenses might be borne proportionately by the states "according to the value and income of personal as well as real estate."<sup>6</sup> Some of the towns objected to conferring on Congress the power of determining war and peace, maintaining that this should be left with the people.<sup>7</sup> Others were "of opinion that the Protestant Religion is not duly Guarded in Said Confederation"<sup>8</sup> or feared "the Arts and Schemes of crafty, designing and ambitious Men."<sup>9</sup> It is clear that these "men of the town meeting" had been pondering on the problems of government. They held views which, if sometimes crude, were none the less pronounced; and they considered themselves competent to devise features not alone for the constitution of their own state but also for the government of the whole thirteen states. Such instances of political self-reliance are not to be found in those colonies which had never recognized the principle of popular ratification.

<sup>1</sup> "It was ratified by the States and not by the citizens of the several States of the Union." — Jameson, sec. 161. Cf. Curtis, "History of the Constitution of the United States," I, Chap. V; Fisher, "Evolution of the Constitution," 248 *et seq.*

<sup>2</sup> In Weston the inhabitants "voted to accept of the consideration of perpetual union as adopted by the Congress and that the representatives be instructed to act accordingly." Minutes of Town Clerk, reprinted, Referendum News, I, 24.

<sup>3</sup> See *post*, Chap. XXIX.

<sup>4</sup> See Massachusetts Archives, 295, Bk. II, Pt. III.

<sup>5</sup> Id. 302.

<sup>6</sup> Id. 300.

<sup>7</sup> E.g. Palmer, Id. 294.

Cf. Amesbury, Id. 300.

<sup>8</sup> Westborough, Massachusetts Archives, CLVI, 299.

<sup>9</sup> Lexington, Id. 295.

### C. *The Constitution of 1780*

Warned by the fate which befell its first effort in constitution-making the next general court, after the rejection of the instrument of 1778, took steps to consult the people at the outset as to what course should be followed in a second attempt. On February 20, 1779, the following "resolve" was adopted:—

"WHEREAS the Constitution or Form of Civil Government which was proposed by the late Convention of this State to the People thereof, hath been disapproved by a majority of the Inhabitants of said State,

*And Whereas*, it is doubtful, from the Representations made to this Court, what are the Sentiments of the major part of the good People of this State<sup>1</sup> as to the expediency of now proceeding to form a new Constitution of Government,

*Therefore, Resolved*, That the Selectmen of the several Towns within this State cause the Freeholders and other Inhabitants in their respective towns duly qualified to vote for Representatives, to be lawfully warned to meet together in some convenient place therein, on or before the last Wednesday of May next, to consider of, and determine upon the following questions:

*First*.— Whether they chuse, at this time, to have a new Constitution or Form of Government made?

*Secondly*.— Whether they will empower their Representatives for the next Year to vote for the calling a State Convention, for the sole purpose of forming a new Constitution, provided it shall appear to them, on examination, that a major part of the people present and voting at the meetings, called in the manner and for the purpose aforesaid, shall have answered the first question in the affirmative?

*And in order that the sense of the People may be known thereon*, BE IT FURTHER RESOLVED, That the Selectmen of each town be and hereby are directed to return into the Secretary's Office, on or before the first Wednesday in June next the doings of their respective towns on the first question above mentioned, certifying the numbers voting in the affirmative and the numbers voting in the negative, on said question."<sup>2</sup>

The response of the electorate to this appeal was prompt and pronounced. For though "nearly one-third of the towns neglected to make returns"<sup>3</sup> those which were made disclosed a large majority

<sup>1</sup> "More expressions from the towns had meanwhile been heard." — Cushing, "Transition from Provincial to Commonwealth Government," *Columbia University Studies*, VII, 227, note 2.

<sup>2</sup> Appendix to *Journal of First Constitutional Convention* (Boston, 1832), pp. 189, 190; *Resolves of the General Assembly of the State of Massachusetts Bay in New England* (Boston, 1778), 120.

<sup>3</sup> Barry, "History of Massachusetts" (Boston, 1857), Vol. III, 176, note 1.

in favor of the convention, so that on June 15, the House of Representatives felt justified in adopting the following: <sup>1</sup> —

*"Whereas*, by the returns made into the Secretary's Office from more than two-thirds of the Towns belonging to this State agreeably to a Resolve of the General Court, of the 20th of February last, it appears, that a large majority of the inhabitants of such Towns, as have made return as aforesaid, think it proper to have a new Constitution or form of Government and are of opinion that the same ought to be framed by a Convention of Delegates, who should be specially authorized to meet for this purpose,

*Therefore Resolved*, That it be and it hereby is recommended to the several inhabitants of the several Towns in this State to form a Convention for the sole purpose of framing a new Constitution, consisting of such number of Delegates, from each Town throughout this State, as every different Town is entitled to send Representatives to the General Court, to meet at Cambridge in the County of Middlesex, on the First day of September next. And the Selectmen of the several Towns and Places within this State, empowered by the laws thereof to send members to the General Assembly, are hereby authorized and directed to call a meeting of their respective Towns, at least fourteen days before the meeting of said Convention to elect one or more Delegates, to represent them in said Convention, at which meeting, for the election of such Delegate or Delegates, every Freeman, Inhabitant of such Town, who is twenty-one years of age shall have a right to vote.

*Be it also Resolved*, That it be, and hereby is recommended, to the Inhabitants of the several Towns in this State, to instruct their respective Delegates, to cause a printed copy of the Form of a Constitution they may agree upon in Convention, to be transmitted to the Selectmen of each Town, and the Committee of each Plantation; and the said Selectmen and Committees are hereby empowered and directed to lay the same before their respective Towns and Plantations, at a regular meeting of the Male Inhabitants thereof, being free and twenty-one years of age, to be called for that purpose, in order to its being duly considered and approved or disapproved by said Towns and Plantations: And it is also recommended to the several Towns within this State, to instruct their respective Representatives to establish the said Form of a Constitution, as the Constitution and Form of Government of the State of Massachusetts Bay, if, upon a fair examination, it shall appear, that it is approved of by at least two-thirds of those, who are free and twenty-one years of age, belonging to this State, and present in the several meetings."

The requirement of two-thirds in order to ratify is the one trace of conservatism in this. It would take another generation before Massachusetts would permit constitution-making by a simple majority.

Pursuant to this resolve, elections were held in the various towns and delegates chosen, some of whom received explicit instructions

<sup>1</sup> Journal of First Constitutional Convention (Boston, 1832), 5, 6.

from their respective towns as to what the new code should contain.<sup>1</sup>

### *The Convention*

The personnel of the convention, which met at the appointed time and place, was most distinguished and gave promise of the finished work which it was to bring forth. Among its three hundred and twenty members were Samuel and John Adams, John Hancock, Robert Treat Paine, and James Bowdoin, the last named being selected as president of the convention, and many others less famous.<sup>2</sup> Indeed, the membership has been pronounced "a union of talent and patriotism such as the country had never seen up to that time, and whose superior has not been seen since."<sup>3</sup>

Foremost in the work of this distinguished assemblage was John Adams, whose relation to the constitution framed by it has been compared to that of Jefferson with respect to the Declaration of Independence.<sup>4</sup> The preparation of the original draft is thus described:—

"A committee was chosen, consisting of thirty persons, to prepare a declaration of rights and the form of a constitution. . . . Immediately upon the adjournment, the committee met in Boston, and, after extended discussion, delegated to a sub-committee of three members, the duty of preparing a draught of a constitution. The three were Mr. Bowdoin, Mr. Samuel Adams and John Adams. By this sub-committee the task was committed to John Adams who performed it. To them the draught was first submitted, and they accepted it, with one or two trifling erasures. It was then reported to the grand committee, who made some altera-

<sup>1</sup> Cushing, "Transition from Provincial to Commonwealth Government," *Columbia University Studies*, VII, 229 *et seq.*

<sup>2</sup> See the roster, *Journal of the First Constitutional Convention*, 8-19. Thorpe says: "Of these John Adams, Samuel Adams, John Hancock, and Robert Treat Paine, were signers; John Hancock, Samuel Adams, and Samuel Holton signed the Articles of Confederation; Gorham signed the Constitution of the United States. John Hancock, Samuel Adams, Increase Sumner, James Sullivan, Caleb Strong, and Levi Lincoln became Governors of the State—Strong and Lincoln each twice. William Cushing declined the office of Chief Justice of the United States, and Levi Lincoln that of Associate Justice. John Lowell became United States District Judge. Theophilus Parsons was for a short time Attorney-General of the United States under John Adams. Ten of the members became delegates to the old Congress and twelve to the national, — of these, George Cabot, Benjamin Goodhue, and Caleb Strong were Senators (1789-1803). Seventeen of the members became Presidential Electors (1789-1821)." — "Constitutional History," I, 132, note.

<sup>3</sup> Robert C. Winthrop, "Addresses and Speeches" (Boston, 1886), IV, 171.

<sup>4</sup> Thorpe, "Constitutional History of the American People," (New York, 1898), I, 131.

tions. The preparation of a declaration of rights was intrusted by the general committee to Mr. Adams alone. It was reported by him, with the exception of the third article upon which he could not satisfy his own judgment. . . .

Considering all these circumstances, as well as the entire coincidence of the leading features of the system with the views of his whole life, it is fair to infer, that the paper was so far the product of his mind, as to merit a place in these volumes of his works."<sup>1</sup>

With the subject-matter of the instrument framed by this body we are not here directly concerned except so far as it may relate to the development of popular ratification. But it is interesting to note throughout the record of its labors the convention's recognition of the sovereignty of the people and its almost painful solicitude for the favor of that sovereign. On the second day of the session and before its real work had begun, it was

"Resolved, That it is the opinion of this Convention that they have sufficient authority from the People of the Massachusetts Bay to proceed to the framing a new Constitution of Government to be laid before them agreeably to their instructions."<sup>2</sup>

On the following day it was further

"Resolved, That it is of the Essence of a free Republic that the People be governed by FIXED LAWS OF THEIR OWN MAKING."<sup>3</sup>

On September 7, a resolution was passed calculated to secure the attendance of delegates from the unrepresented towns and promising that any delegate producing a proper certificate "from the Selectmen, or the Town Clerk of the Town, he or they may represent, shall be admitted to vote and act in this Convention."<sup>4</sup> Care was also taken to secure the election of delegates in place of one who had died,<sup>5</sup> and another (John Adams) who had been sent to Europe on a diplomatic mission.<sup>6</sup> In November, just before the convention adjourned for a recess, President Bowdoin issued an address to the members in which the importance of satisfying the people is the pervading thought. He says *inter alia*:<sup>7</sup> —

"As the good people of this State are impressed with the idea of the necessity of a new and a good Constitution of Government, and have a right to expect of the present Convention the exertion of their best abilities to frame such an one; and as the framing it, and its acceptance, when framed, must greatly depend on

<sup>1</sup> "Life and Works of John Adams, Second President of the United States" (Boston, 1851), IV, 215, 216.

<sup>2</sup> Journal of First Constitutional Convention (Boston, 1832), 22.

<sup>3</sup> Id. 24.

<sup>4</sup> Id. 33.

<sup>5</sup> Id. 45.

<sup>6</sup> Id. 51.

<sup>7</sup> Id. 49.

the collective wisdom of the Convention being had, in the final determination on every part of it, but which cannot be had without a general and constant attendance; I am directed by a vote of the Convention, to enjoin upon the members, *from its necessity and importance*, A CONSTANT AND GENERAL ATTENDANCE accordingly.

Gentlemen do not need to be informed that they will find it difficult, if not impossible, to explain, to the satisfaction of their constituents, any form of Government the Convention may agree upon, unless they had been present at the debates and entered minutely into the grounds and reasons of every decision. Even the best form may be rejected, for want of such an explanation and removing objections, which, had they duly attended the Convention, might without difficulty have been removed."

The question of submitting the constitution to the electors was, of course, not debated in the convention. It had been settled by the resolves of the General Court and indeed by the whole course of Massachusetts political history. But the method of changing the constitution in case it should be adopted, was the subject of some discussion. The plan finally chosen was that of amendment by convention, a plan which was employed but once, much later than at first intended, and then discarded for the system of amendments framed by the legislature and adopted by the people. The provision in the instrument of 1780 was as follows:<sup>1</sup>—

"In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord, one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

And said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen."

### *The Submission*

When the convention had completed its labors, it adjourned to await, not without some misgivings, the action of the voters. But it

<sup>1</sup> Constitution, Chap. VI, Art. X; Poore, "Charters and Constitutions," I, 972, 973.

was careful to provide for the alternative of rejection, at least in part, as the following, adopted March 2, 1780, will show:<sup>1</sup> —

*“Resolved, That this Convention be adjourned to the first Wednesday in June next, to meet at Boston; and that eighteen hundred copies of the Form of Government, which shall be agreed upon, be printed; and including such as shall be ordered to each Member of the Convention, be sent to the Selectmen of each Town, and the Committees of each Plantation, under the direction of a Committee to be appointed for the purpose; and that they be requested, as soon as may be, to lay them before the Inhabitants of their respective Towns and Plantations. And if the major part of the inhabitants of the said Towns and Plantations disapprove of any particular part of the same, that they be desired to state their objections distinctly, and the reasons therefor: And the Selectmen and Committees aforesaid are desired to transmit the same to the Secretary of the Convention, on the first Wednesday in June, or if may be, on the last Wednesday in May, in order to his laying the same before a Committee, to be appointed for the purpose of examining and arranging them for the revision and consideration of the Convention at the adjournment; with the number of voters in the said town and plantation meetings, on each side of every question; in order that the said Convention, at the adjournment, may collect the general sense of their constituents on the several parts of the proposed Constitution; and if there doth not appear to be two-thirds of their constituents in favour thereof, that the Convention may alter it in such a manner as that it may be agreeable to the sentiment of two-thirds of the voters throughout the State.*

*RESOLVED, That it be recommended to the Inhabitants of the several towns and plantations in this State, to empower their Delegates, at the next Session of this Convention, to agree upon a time when this Form of Government shall take place, without returning the same again to the people: PROVIDED, That two-thirds of the male Inhabitants of the age of twenty-one years and upwards, voting in the several town and plantation meetings, shall agree to the same, or the Convention shall conform it to the sentiments of two-thirds of the People as aforesaid.*

*RESOLVED, That the Towns and Plantations thro' this State, have a right to choose other Delegates, instead of the present members to meet in Convention on the first Wednesday in June next, if they see fit.”*

At the same time the convention, through its officers, issued an address to the people, explaining and defending the product of their labors and suggesting rather than advocating its adoption. Indeed, this address has been characterized as “so conciliatory as to be almost ludicrous.”<sup>2</sup> The opening paragraphs will sufficiently indicate its tone:<sup>3</sup> —

<sup>1</sup> Journal of First Constitutional Convention (Boston, 1832), 168, 169.

<sup>2</sup> Harding, “The Federal Constitution in Massachusetts” (New York, 1896). Harvard Historical Studies, II, 6.

<sup>3</sup> Journal of First Constitutional Convention (Boston, 1832), Appendix, 216.

"FRIENDS AND COUNTRYMEN:

Having had your Appointment and Instruction, we have undertaken the arduous Task of preparing a civil Constitution for the People of the Massachusetts Bay; and we now submit it to your candid Consideration. It is your Interest to revise it with the greatest Care and Circumspection, and it is your undoubted *Right*, either to propose such Alterations and Amendments as you shall judge proper, or, to give it your own Sanction in its present Form, or, totally to reject it.

In Framing a Constitution, to be adapted as far as possible to the Circumstances of Posterity yet unborn, you will conceive it to be exceedingly difficult, if not impracticable, to succeed in every part of it to the full Satisfaction of all. Could the *whole Body* of the People have Convened for the same Purpose, there might have been equal reason to conclude, that a perfect Unanimity of Sentiments would have been an Object not to be obtained. In a Business so universally interesting, we have endeavored to act as became the Representatives of a wise, understanding and free People; and as we have Reason to believe you would *yourselves* have done, we have opened our Sentiments to each other with Candor, and made such mutual Concessions as we could consistently, and without marring the only Plan which in our most mature Judgment we can at present offer to you."

Thus the constitution was placed before the sovereign people. But the sovereign was slow and not altogether clear in expressing his will, though suggestions and proposals were made "upon all matters of theory and practice from the beginning to the end of the political philosophy of the time."<sup>1</sup> When, after a three months' recess, the convention reassembled in June, the committee appointed to revise and arrange the returns reported:<sup>2</sup> —

"That one hundred and forty-seven towns have made returns. That they have examined seventy six of them; that in those returns they find the number of persons present and voting to be 5,776; That the number in favour (of) the Constitution without amendments, and of such Constitution as two thirds of the persons voting thro' the State shall agree to, or the Convention shall form agreeably to the sentiments of two thirds, even though the amendments proposed should not be obtained, they find to be 4,564, but that several towns have returned their acceptance of the Constitution with certain amendments<sup>3</sup> and have not

<sup>1</sup> Cushing, "Transition from Provincial to Commonwealth Government," Columbia University Studies, VII, 264 *et seq.*, where many interesting examples of these are given. Cf. also Jameson's "Introduction to the Study of the Constitutional and Political History of the States," Johns Hopkins University Studies, IV, 207-209.

<sup>2</sup> Journal of First Constitutional Convention (Boston, 1832), 172.

<sup>3</sup> Boston was one of the towns which "expressed a desire for several alterations and instructed their delegates accordingly." — Bradford, "History of Massachusetts," II, 186.

Weston "voted to accept the Constitution and Form of Government as it now stands, but it is our opinion that it should be revised within ten years and made certain. Yeas 54, nays 20." Minutes of Town Clerk, reprinted, Referendum News, I, 25.



## THE PEOPLE'S LAW

ained whether they would accept it in case their proposed amendments do  
tain, upon which they desire the opinion of the Convention, whether they  
ke the sense of those towns from their delegates; and finally, that they have  
yet entered into the merits of the objections made, or amendments proposed;  
g it more eligible first to go through the returns in the manner aforesaid."

n addition of twelve was thereupon made to this committee in  
that the returns as to each article might be tabulated. On  
llowing day the committee reported:<sup>1</sup> —

That 174 towns have made returns; that in order to collect the true sense of  
ople, the Committee have been obliged to make a column for every article,  
other for the amendment proposed, with the numbers for and against the  
that they have not been able to complete any one county, because there are  
in each that have, as yet, not made returns."

o this report the committee attached a diagram showing the  
er in which the returns were being tabulated. On June 13  
committee asked the convention to limit the time for receiving  
as.<sup>2</sup>

his limit was finally fixed at the morning of the next day, and  
ame afternoon the committee on returns made its general re-

On the 15th the convention voted to consider the constitu-  
*eriatim*, which was done as follows:<sup>4</sup> —

Revolution." Though not the earliest of the American constitutions, it is to-day the oldest.<sup>1</sup> While all similar instruments of its time have been swept away and superseded by later constitutions, it still survives, with prestige unimpaired, supplemented only by amendments which time has made necessary.<sup>2</sup> Then, too, this venerable charter has been a model, both in form and substance, for all subsequent constitution-makers. Borgeaud refers to it as "having served as the principal model of the Federal Convention of 1787, and later of the assemblies called to revise the first state constitutions."<sup>3</sup> The historian of New Hampshire, writing shortly after its adoption, speaks of the superior advantage enjoyed by the third constitutional convention of that state, "the neighboring state of Massachusetts having digested and adopted a constitution, which was supposed to be an improvement upon all which had been framed in America."<sup>4</sup> We shall see later how it afforded a model for Maine's constitution.<sup>5</sup>

When, a decade later, amid the turmoil of the French Revolution, its leaders began to think of written constitutions, they turned to this ripened product of the statecraft of New England and borrowed its ideas. Borgeaud<sup>6</sup> speaks of the declaration of the Rights of Man of 1789 as having been "made under the spell of American ideas," and says that the "personal participation" feature of that instrument "was the Massachusetts system, with whose popularly ratified constitution the assembly was familiar, and to whose influence the cahiers more than once bore witness."

And not only in the method of adoption but in the substance also this instrument offered some original features. The separation of governmental powers into executive, legislative, and judicial, though

<sup>1</sup> Thayer, "Cases on Constitutional Law" (Cambridge, 1895), I, 215.

<sup>2</sup> "Its excellence has been attested by its continuation in force until the present time. Though amended thirty-four times, the changes have not affected the principles on which the plan rests but are chiefly administrative in character." — Thorpe, "Constitutional History of the American People" (New York, 1898), I, 132.

<sup>3</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 18.

<sup>4</sup> Belknap, "History of New Hampshire" (Boston, 1796), II, 435. Nearly forty states have followed Massachusetts by inserting in their constitutions the distributive clause relating to the three powers of government.

<sup>5</sup> *Post*, Chap. XIII.

<sup>6</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 199, 200.

in theory as old as Aristotle,<sup>1</sup> and elaborated by Montesquieu,<sup>2</sup> was first enacted into law in the American constitutions of the revolutionary period. And while the distributive clause appeared in several of the state constitutions adopted prior to that of Massachusetts,<sup>3</sup> it is in the latter that it finds the clearest and most complete expression. John Adams, the author of the instrument, was a disciple of Harrington, the English publicist of the Commonwealth period,<sup>4</sup> who was an ardent believer in the doctrine of the separation of powers, and whose very language appears to have been embodied in this Massachusetts constitution. Professor Dwight, speaking of Harrington's *Oceana*, says: <sup>5</sup> —

"Beginning with the true nature of government, he declared it to be an 'Empire of laws and not of men.' This had been asserted, it is true, by philosophers of antiquity, but it had been forgotten or disowned. He reasserted it continually, brought it into notice, and made it the corner-stone of his system. To this may probably be traced the famous declaration in the constitution of Massachusetts, Part 1, Article 30:

"'In the government of this commonwealth, the legislative department shall never exercise the legislative and judicial powers, or either of them . . . *to the end it may be a government of laws and not of men.*'"

This constitution was thus adopting and popularizing the best political thought of the English race. But the most assured title to fame, of this first Massachusetts constitution, rests upon none of these features, important as they are. It deserves to be longest remembered in history as the first popular American state constitution. It was desired, inspired, and ratified by the people, and framed under their watchful eye by their specially chosen servants. As its author himself wrote while it was in preparation: <sup>6</sup> —

"There never was an example of such precautions as are taken by this wise and jealous people in the formation of their government. None was ever made so perfectly upon the principle of the people's rights and equality. It is Locke, Sidney and Rousseau and De Mably reduced to practice, in the first instance. I wish every step of their progress printed and preserved."

<sup>1</sup> "Politics" (Jowett's Trans., Oxford, 1885), Bk. IV, 14, 2; Bk. VI, 8.

<sup>2</sup> "*Esprit du Lois*" (Nugent's Trans., London, 1758), Vol. I, Bk. XI, Chap. VI.

<sup>3</sup> Bondy, "The Separation of Governmental Powers" (New York, 1896), Columbia University Studies, V, No. 2, 19.

<sup>4</sup> See Professor Theodore W. Dwight's instructive article on "Harrington," *Political Science Quarterly*, II, 1. He says (3), "Adams was perfectly familiar with Harrington's *Oceana*, and much influenced by its teachings, as his writings will show."

<sup>5</sup> Id. 18.

<sup>6</sup> "Works of John Adams" (Boston, 1851), IV, 216.

Truly, this was a constitution "of the people, by the people, for the people."<sup>1</sup> And withal it was a perfectly natural product of political conditions. Its roots lay deep in the soil of New England history, and it was the immediate result of five generations of civic evolution. The discipline of the town meeting, the popular experience in direct legislation, the constant struggle for the exercise of the right of self-government — were all summed up and embodied in its adoption. Thus it occupies a place midway in our constitutional history. Its direct lineage harks back a century and a half to the beginning of political life in America, and its posterity reaches forward a century and a quarter to our own day.

<sup>1</sup> The development of this thought and its expression forms a thread in the web of political literature which appears to run as follows:—

"For we put the power in the people."—William Penn (1676).

"All power is a trust; . . . from the people and for the people all springs and all must exist."—Disraeli (1826).

"The people's government, made for the people, made by the people and answerable to the people."—Daniel Webster (1830).

"This is what I call the American idea . . . a democracy—that is a government of all the people by all the people for all the people."—Theodore Parker (1850).

"Government of the people, by the people, for the people shall not perish from the earth."—Lincoln (1863).

## CHAPTER XII

### INSTRUMENTS OF THE REVOLUTIONARY ERA (*Concluded*)

#### NEW HAMPSHIRE

##### *A. The Articles of Confederation*

IN New Hampshire, as in Massachusetts, though to a less degree, the acceptance of the Articles of Confederation was made the occasion of applying the principle of the plebiscitum, and undoubtedly prepared the way for putting in vogue the plan of popular ratification of the state's constitution. On December 24, 1777, the New Hampshire House of Representatives, in Committee of the Whole, took up for consideration these Articles which had lately been transmitted from the Continental Congress. A letter had also been received from Henry Laurens, President of the Congress, urging that authority be given to the delegates immediately to subscribe the Articles.<sup>1</sup> Nevertheless the committee merely agreed to recommend "that the Articles of Confederacy be printed forthwith & Dispersed to ye number of 250."<sup>2</sup> On December 27 it was —

"Voted, That the following words be printed at the bottom of the Articles of Confederation, and before the vote of the General Court relative to instructing the Representatives, viz:

'The foregoing Articles of Confederation, as formed by the Hon'ble, the Continental Congress, are printed and to be dispersed throughout this State, That every person may give their sentiments thereon, and the following vote of the General Assembly of the State of New Hampshire is also published for the same purpose.'"<sup>3</sup>

In this we behold a near approach to a plebiscitum. In spite of the gravity of the situation and the anxiety of the Continental Congress, the New Hampshire legislators were not willing to ratify these

<sup>1</sup> See this letter printed in New Hampshire State Papers, VIII, 754, 755. A copy seems to have been sent to each state.

<sup>2</sup> Id. 746.

<sup>3</sup> Id. 758.

articles at once, but insisted on consulting the people. This, it will be remembered, was the course adopted in Massachusetts, and it is significant that the voting on these articles was at this time in progress in the latter colony. In New Hampshire the reference of the articles to the electors was not so complete or explicit as in Massachusetts, but the former seems to have been suggested by the latter. We shall see more of this intercolonial influence as we proceed.

It does not appear how extensively the electorate of New Hampshire responded to this referendum, for we have not the wealth of material for that colony which is afforded by the town resolves, preserved in the Massachusetts archives. But ample time was allowed for the New Hampshire electors to "give their sentiment" regarding the Articles of Confederation, for it was nearly two months before these again came before the Provincial Congress.

On February 24, 1778, both houses considered them in joint committee of the whole and, though the eighth article relating to the revenue of the Confederation was debated at length, all were finally adopted.<sup>1</sup> Evidently there had been no serious objections from the voters.

The opposition to this eighth article did not end in New Hampshire. Five years later the Continental Congress itself agreed to an amendment of this article which it transmitted to the states for ratification. When received by the General Assembly of New Hampshire, that body, on June 20, 1783, issued an address to the people, reciting the proposed amendment, embodying the reasons advanced by the Continental Congress, and closing with this significant statement:<sup>2</sup> —

"The General Assembly having maturely considered the alteration proposed & recommended to be made, are fully convinced of the expediency and utility of the measure; but at the same time wish to be instructed and empowered particularly by their constituents in a matter of such importance as the alteration of an Article of the Confederation: And, therefore recommend to the Selectmen of the several Towns and places in this State as soon as may be, to call meetings for the purpose of instructing and empowering their representatives, with respect to the proposed alteration."

How much more definite and explicit is this than the first reference to the people is apparent from the most casual comparison. The doctrine of popular ratification had made rapid strides in five years.

<sup>1</sup> State Papers, VIII, 773, 774.

<sup>2</sup> Id. 981, 982.

### B. *The Movement for a Permanent Constitution*

As we have seen, the form of government which had been adopted in New Hampshire in 1776 did not purport to be more than temporary. Its framers hoped merely to tide over the interval until "a reconciliation between us and our parent state can be effected."<sup>1</sup> It is not strange, therefore, that, under the strain of war, serious defects were found in this brief and hastily prepared constitution. "One was the want of an executive branch of government."<sup>2</sup> Another was its autocratic character,<sup>3</sup> and the arbitrary power it conferred upon the legislature. These and other reasons led to steps toward a more permanent and satisfactory plan of government.

At the first session of the House of Representatives on December 27, 1777, that body adopted a resolution offered by Thomas Odiorne of Exeter: —

"That it be recommended to Towns, Parishes & places in this State, if they see fit, to instruct their Representatives at the next session, to appoint & call a full and free Representation of all the people of this State to meet in Convention at such time & Place as shall be appointed by the General Assembly, for the sole purpose of framing & laying a permanent plan or system for the future government of this state."<sup>4</sup>

No action regarding this resolution seems to have been taken by the council during that session, but at the ensuing one, on February 25, 1778, both houses, in pursuance of a previous arrangement, met in a joint committee of the whole to consider the question of calling a convention. The Journal discloses that: —

"After some time spent thereon the Committee agreed to report:

That a full and free representation of all the People of this State be called as soon as conveniently may be, for said purpose; That the Convention be on the second Wednesday in June next; That they meet at Concord in this State; That each Town, Parish or Precinct sending a member or members to said Convention pay their own members for their time & expense; That when the said Convention have formed such Plan of Government, they lay the same before their constituents for their approbation, before the same shall take effect; *That such plan shall not take effect until three quarters of the people of this State shall consent thereto.*"<sup>5</sup>

<sup>1</sup> *Ante*, 140.

<sup>2</sup> Belknap, "History of New Hampshire" (Boston, 1791), II, 401.

<sup>3</sup> Thorpe, "Constitutional History of the American People" (New York, 1898), I, 115.

<sup>4</sup> New Hampshire State Papers (Concord, 1874), VIII, 757, 758.

<sup>5</sup> *Id.* 774.

Here, then, we find the doctrine of popular ratification in its complete form introduced into the public law of New Hampshire. What had caused its introduction at this time when only two years before, at the framing of the original constitution, the doctrine seems to have been ignored? The answer to this must probably again be sought in the example of Massachusetts. The connection between the two colonies had always been close. During part of the seventeenth century they had been united in one government.<sup>1</sup> It was but natural that the younger and weaker colony should become the political disciple of the older and more highly developed one, and should draw from the latter's fund of experience. And it was just at this time, as we have seen, that Massachusetts was passing through one of the most fruitful periods of her civic evolution. Her people, in response to a request from the General Court, had, during the preceding months, been expressing themselves in their town meetings on the question of calling a convention. And at this very time, when the same subject was before the committee of the whole of the New Hampshire Provincial Congress, the Massachusetts General Court was debating the draft of the proposed constitution of 1778, which, on February 29, it submitted to the towns "for their approbation or disapprobation," in language strikingly similar to that used in the New Hampshire report three days earlier. We are not without data as to actual communication between the two bodies meeting simultaneously at Exeter and Boston,<sup>2</sup> and the coincidences in their proceedings can hardly have been altogether accidental. There is little reason to doubt that popular ratification in New Hampshire at that particular time was one of the results of the object lessons then being presented by Massachusetts. But if there was imitation in this feature, there was departure in another. For on the same day that the report above quoted was agreed to by the committee of the whole of the New Hampshire legislature, it further agreed to report —

"that the foregoing articles of Direction be not recommendatory but Directory, and that Precepts issue to each Town, Parish & District in this State if they see fit to send one or more members to the said Convention saving to any two or more Towns, Parishes or Districts, if they see fit to join together in electing & sending one member to represent them in said Convention."<sup>3</sup>

<sup>1</sup> See Mr. Eaton's article, "The Right to Local Self-Government," *Harvard Law Review*, XIV, 137.

<sup>2</sup> New Hampshire State Papers (Concord, 1874), VIII, 857.

<sup>3</sup> *Id.* 774.



This, it will be seen, is very different from the humble, not to say obsequious, tone adopted by the General Court and Convention of Massachusetts. But the New Hampshire legislators were soon to learn that their constituents would not be forced.

On the following day, February 26, the House, in pursuance of these reports, adopted the following:—

“WHEREAS, the present situation of affairs in this State makes it necessary that a full & free Representation of the Inhabitants thereof should meet in Convention for the sole purpose of forming and laying a permanent plan or system of Government for the future Happiness and well-being of the good people of this State & this House having received Instructions from a considerable part of their Constituents for that purpose: Therefore,

Voted and Resolved, that the Hon’ble, the President of the Council issue to every Town, Parish & District within the State a Precept recommending to them to elect and choose one or more persons as they shall judge expedient, to convene at Concord in said State, on the tenth day of June next for the purpose aforesaid, saving to the small Towns liberty to join two or more together, if they see fit to elect & send one person to represent them in said Convention.

And such system or form of Government as may be agreed upon by Such Convention being printed and sent to each & every Town, Parish and District in this State for the approbation of the People, which system or form of Government, being approved by three-fourth parts of the Inhabitants of this State in their respective Town meetings legally called for that purpose and a return of such approbation being made to said Convention & Confirmed by them, shall remain as a permanent system or Form of Government of the State, and not otherwise; and that the charge and expense of each member of Such Convention be defrayed by their respective electors.”<sup>1</sup>

### *C. Work of the First Convention*

The convention met at the time and place appointed and entered upon its task of framing a constitution.<sup>2</sup> The work was not completed, however, until almost a year later when an instrument was agreed upon whose closing paragraph was as follows:—

“The General Court shall have no power to alter any part of this constitution; but in case they should concur in any proposed alteration, amendment or addition, the same, being agreed to by a majority of the people, shall become valid.”<sup>3</sup>

<sup>1</sup> New Hampshire State Papers (Concord, 1874), VIII, 775, 776.

<sup>2</sup> See for its text Collections New Hampshire Historical Society (Concord, 1834), IV, 154 *et seq.*; also New Hampshire Town Papers (Concord, 1875), IX, 837–841. The editor of the last named volume says (834): “It is much to be regretted that the Journal of that Convention cannot anywhere be found.”

<sup>3</sup> *Id.* 841.

### At the same time the convention

"Voted, that the foregoing Bill of Rights, and Plan of Government, be printed, and dispersed throughout this State, for the people thereof, to give their opinion thereon.

Voted, that Colonel Thornton and Colonel Bartlett, be a committee to get this plan of government printed, and transmit two or more copies of the same to each and every town, parish and place in this State, to which precepts for this convention were sent, and publish the same in the New Hampshire newspapers.

Voted, That the selectmen of the several towns, parishes and districts in this State, upon the receipt of the same, are desired to notify and warn the legal inhabitants paying taxes in such town, parish or place, to meet at some suitable place therein, giving them at least fifteen days notice, for the purpose of taking said plan under consideration; and make return of the number of voters present at such meeting, and how many voted for receiving said plan, and how many for rejecting the same, unto this convention at Concord, in this State, on the third Tuesday in September next."<sup>1</sup>

But the instrument thus drafted and sent to the people is described as "so deficient . . . in its principles, and so inadequate in its provisions, that being proposed to the people in their town meetings, it was rejected."<sup>2</sup>

### *D. The Second Convention*

The failure of this attempt did not, however, discourage the advocates of a permanent constitution. In March, 1781, the House of Representatives voted in favor of a second convention "to settle a Form of Government,"<sup>3</sup> and in the following month a joint resolution was passed providing for a convention to meet at Concord in June.<sup>4</sup> The body which assembled<sup>5</sup> in pursuance of this resolution framed a new instrument,<sup>6</sup> and also prepared an address<sup>7</sup> to the people in its behalf. An original and significant provision of the new constitution was the following:—

"To preserve an effectual adherence to the principles of the Constitution, and to correct any violation thereof; as well as to make such alterations therein, as from experience may be found necessary, the General Court shall after the

<sup>1</sup> New Hampshire Town Papers, edited by Bouton (Concord, 1875), IX, 841, 842.

<sup>2</sup> Belknap, "History of New Hampshire" (Boston, 1791), II, 434, 435.

<sup>3</sup> New Hampshire Town Papers (Concord, 1875), IX, 842.

<sup>4</sup> Id. Cf. New Hampshire State Papers (Concord, 1874,) VIII, 894-897.

<sup>5</sup> "The Journal of that Convention has not been found." New Hampshire Town Papers, IX, 842.

<sup>6</sup> See Id. 852 *et seq.* for its text.

<sup>7</sup> Id. 845 *et seq.*

expiration of seven years from the time this Constitution shall take effect issue their precepts to the selectmen of the several towns and to the assessors of unincorporated places within this State, directing them to convene the qualified voters therein, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order for amendments; And if it shall appear by the returns made, that two thirds of the qualified voters through the State who shall assemble and vote in consequence of said precepts, are in favor of such revision and amendments, the General Court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns and unincorporated places to elect delegates to meet in Convention for the purpose aforesaid."<sup>1</sup>

Upon completion of the work it was —

"RESOLVED, that this convention be adjourned to the fourth Wednesday of January next, to meet at Concord; and that seven hundred copies of the Plan of Government, which is agreed upon, to be printed, including such as shall be ordered to each member of the General Court and of the Convention, be sent to the selectmen of each town, and assessors of each plantation, under the direction of the Committee appointed for that purpose and that the selectmen and assessors be requested as soon as may be to lay the same before the Inhabitants of their respective towns and plantations. And if the major part of the inhabitants of said towns and plantations disapprove of any particular part of the same, that they be desired to state their objections distinctly and the reasons therefor. And the selectmen and assessors are desired to transmit the same to the Convention on the fourth Wednesday of January aforesaid, or to the Secretary of the Convention before then, in order for the revision and consideration of the convention at the adjournment. . . . And if there should not appear to be two thirds of the people in favor thereof, that the Convention may alter it in such manner as may be most agreeable to the sentiments of two thirds of the voters throughout this state."<sup>2</sup>

Upon reassembling at the appointed time it was found that the work of this convention had likewise failed to receive the popular approval.<sup>3</sup> The convention thereupon again adjourned until August, when a second draft was agreed upon,<sup>4</sup> another address issued,<sup>5</sup> and another adjournment taken to await the action of the voters. The result was a rejection of this second instrument also, and the convention reassembled in December, 1782, and framed a third plan of government.<sup>6</sup> This time the legislature took part in the proceedings and issued an address to the people declaring that its members

<sup>1</sup> New Hampshire Town Papers (Concord, 1875), IX, 876, 877.

<sup>2</sup> Id. 877.

<sup>4</sup> See Id. 882 *et seq.* for text.

<sup>3</sup> Id.

<sup>5</sup> Id. 877 *et seq.*

<sup>6</sup> See Id. 896 *et seq.* for text. The editor suggests that the Bill of Rights "virtually and in effect abolished slavery as it existed in New Hampshire."

"while fully convinced of the Utility & necessity of continuing the present Government . . . are deeply impressed with a sense of the necessity and importance of having a free & permanent government established in this State, and cannot omit this opportunity to recommend to their constituents a more particular & serious attention to an object so essential to the Security and happiness of themselves and posterity. That the citizens of this State would in future be more general and explicit in their returns concerning a matter of such magnitude."<sup>1</sup>

This sounds much like a rebuke; but the electors do not seem to have resented it. For not only was the old form of government continued "by the votes of the people in their town meetings,"<sup>2</sup> but this third attempt of the convention was successful. Its labors when submitted this time were at last approved, and on June 2, 1784, the first popular constitution of New Hampshire was proclaimed in force.

We may now pause to recapitulate the steps taken during the revolutionary era toward popular ratification. The first formal proposal to apply it to a state constitution was made by Jefferson in Virginia, early in June, 1776. On the 14th of the same month, the first formal popular demand for submission came from the "Mechanicks in Union" of New York. On November 1 of the same year, the first popular demand in the South came from the people of Mecklenburg County, North Carolina. In the following year the first formal consultation of the people with reference to a state constitution took place in Massachusetts, and in the same state on February 28, 1778, occurred the submission to the people of a proposed state constitution, while the first actual popular ratification followed during the period from March to June, 1780.

<sup>1</sup> New Hampshire State Papers (Concord, 1874), VIII, 970.

<sup>2</sup> Belknap, "History of New Hampshire" (Boston, 1791), II, 438.

## CHAPTER XIII

### POPULAR RATIFICATION EXTENDED THROUGHOUT NEW ENGLAND

#### *A. New Hampshire*

##### *1. The Federal Constitution*

THE growth of popular constitution-making, during this period, was not confined merely to those instruments which were framed for the individual states. We have seen how the Articles of Confederation were brought before the people of Massachusetts and New Hampshire. Something of the same sort was done in a few of the states with reference to the Federal Constitution.

The New Hampshire Convention "for the Investigation, Discussion and Decision" of this instrument, met at Exeter, February 13, 1788.<sup>1</sup> That the question of its adoption was not formally referred to the people seems to have been largely due to the fact that the latter considered it already before them. Thus a town meeting of Warner, held prior to the assembling of the convention, "voted not to Except (*sic*) the new Constitution."<sup>2</sup> In Dunstable a similar vote was taken and a committee appointed to draft instructions to the delegates, and a recital of objections was prepared by it and forwarded to the convention.<sup>3</sup> In Amherst the delegate was instructed to oppose ratification,<sup>4</sup> and in New Ipswich the question of accepting the constitution was the one upon which the choice of a delegate turned.<sup>5</sup> The electorate of New Hampshire was alive to the importance of the pending question.

"While the long winter intercepted the labors of husbandry," says Bancroft,<sup>6</sup> "the firesides of the freeholders in its hundreds of townships became the scene

<sup>1</sup> See Walker, "History of the New Hampshire Convention" (Boston, 1888), 6.

<sup>2</sup> Harriman, "History of Warner," 253.

<sup>4</sup> Secomb, "History of Amherst," 860.

<sup>3</sup> Fox, "History of Dunstable," 188.

<sup>5</sup> "History of New Ipswich," 116.

<sup>6</sup> "History of the Constitution" (6th Ed., New York, 1889), II, 318.

for discussing the merits of the federal Constitution with the delegates of their choice and with one another."

It was on this account that the Exeter convention took a recess. A majority of them had come instructed against ratification. In the course of their debates and deliberations many had found reason to change their views, but before they would act on their new opinions they insisted upon again consulting their constituents.<sup>1</sup> An adjournment was taken for nearly four months, and the delegates were thus enabled to refer the question once more informally to the people of their respective towns.<sup>2</sup> It was not until this was done and a change of popular sentiment had been indicated, that the Federal Constitution was ratified in New Hampshire. And along with ratification came a suggestion of amendments and alterations to meet the objections raised by the people.<sup>3</sup>

## 2. *The Constitution of 1793*

The state constitution adopted in 1784, though intended to be "permanent" and evolved at such cost of time and travail, was not destined long to endure. At the end of the first seven years when, pursuant to its provision, the question was submitted, the people in their town meetings asked for another convention to frame amendments, and such a body met accordingly at Concord on September 7, 1791.<sup>4</sup> One of its first acts was the appointment of a committee consisting of two from each county to draft constitutional amendments for submission to the people. The labors of this committee were performed during a recess of the convention which was meanwhile taken until February, 1792. Upon reassembling, seventy-two of the amendments thus prepared were submitted, but of these only forty-six were ratified by the voters. And though by submitting separately these proposals the members of the convention had intended to obviate the necessity of a further session, it was found that by reason of the partial adoption and the conflict between the amendments and the old constitution such a session was necessary. The convention therefore again reassembled on September 5, 1792, and

<sup>1</sup> Walker, "History of the New Hampshire Convention" (Boston, 1888), 29.

<sup>2</sup> Id. Chap. IV.

<sup>3</sup> Id. Chap. VI.

<sup>4</sup> See an account of this convention in an address by Hon. William Plumer before the New Hampshire Historical Society, June 16, 1853, printed in *The Historical Magazine* (Morrisania, New York, 1868), N. S., IV, 172, 176.

framed a new constitution. Profiting by the lessons of many failures, as well as by the experiences of sister commonwealths, the members had now at last been able to produce an instrument which satisfied their constituents. It retained the old Bill of Rights and the septennial referendum, but introduced elsewhere many new features. Two-thirds of the electors having voted in its favor it became effective in June, 1793.

"It proved so satisfactory to the people," says Plumer,<sup>1</sup> "that, though at every septennial term the question of revision was propounded, it was not until 1850 that another convention, the fifth in the series, was called."

No further convention was held until 1902, and it submitted only amendments,<sup>2</sup> leaving the instrument of 1793 intact in its fundamental features.<sup>3</sup>

Thus at last was attained that "permanent form of government" for which the statesmen of New Hampshire had for so many years been striving. But while accomplishing this the people of the Granite State were also, perhaps unconsciously, developing and perpetuating a system of popular participation in constitution-making which was of far greater importance than the fate of any single instrument. New Hampshire takes her place beside her political mentor, Massachusetts, and the two remained the only states which actually required popular approval of their own constitutions during the eighteenth century. But the plan which they were thus applying was destined to be the model for the states of the entire American Union,<sup>4</sup> as well as for some nations of the older world.

### *B. Rhode Island*

We have seen how thoroughly the idea of popular ratification entered into the colonial polity of Rhode Island. When that state renounced its allegiance to Great Britain it did not, as did most of the other commonwealths, proceed to frame a new constitution. Like

<sup>1</sup> *The Historical Magazine* (Morrisania, New York, 1868), N. S., IV, 176, 177.

<sup>2</sup> See its Journal (Concord, 1903), 813 *et seq.* These were all adopted. Id. 878.

<sup>3</sup> "The permanent constitution . . . was unchanged for sixty years, 1792-1859, a fact unparalleled among the other states except Rhode Island and New Jersey, and has now been in force one hundred and twenty years." — Colby, "Manual of the Constitution of New Hampshire," 5, 6.

<sup>4</sup> We shall notice how the Western states, beginning with Indiana (1816), adopted the New Hampshire system of periodical consultation of the people.

its neighbor Connecticut, only longer, it continued under its colonial charter. This was a liberal, and, on the whole, a satisfactory,<sup>1</sup> instrument which had been procured for the colony, as we have seen,<sup>2</sup> by John Clarke and Roger Williams with the assistance of Sir Henry Vane the Younger, and for two generations it remained the only written constitution<sup>3</sup> of the state. That its retention indicated no departure by the people of Rhode Island from democratic tradition is clear from the manner in which they considered the Federal Constitution. The process of consulting the people at every step, which we have just reviewed in Massachusetts and New Hampshire, as regards their state constitutions, was repeated in Rhode Island with reference to the work of the Philadelphia convention.

The Federal Constitution was referred to the states on September 28, 1787. The general assembly of Rhode Island met in the following October, but instead of passing directly on the proposed instrument, as all the states outside of New England had done, the Rhode Island body passed an act providing for the printing and distribution of a thousand copies of it, "that the freemen may have an opportunity of forming their sentiments of the proposed constitution."<sup>4</sup> It was further provided that the wishes of the people should be expressed by the ensuing session in the form of instructions to their

<sup>1</sup> "For one hundred and eighty years it had been regarded as the shield of popular freedom against Royal prerogative or Federal encroachment. It was the last remaining beacon planted by the Republicans of the seventeenth century, and so firmly that the war of the Revolution had not changed its position, for they both rested upon the same foundation, — the inherent right of self-government." — Arnold, "History of Rhode Island" (New York, 1859), I, 294, 295.

<sup>2</sup> *Ibid.*, 85.

<sup>3</sup> Some authorities have denied that the state had any written constitution at all during this period. Mr. Justice Story, writing in 1829, says: "Rhode Island is the only state in the Union which had not a written constitution of government containing its fundamental laws and institutions. Until in 1776, it was governed by the charter granted by Charles II in the fifteenth year of his reign. That charter has ever since continued, in its general provision, to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people and, except so far as it has been modified to meet the exigencies of the revolution, may be considered as now a fundamental law." *Wilkinson v. Leland*, 2 Pet. (U.S.) 627, 656.

Mr. Thorpe ("Constitutional History of the American People," New York, 1890, I, 140) says: — "Rhode Island and Connecticut had unwritten constitutions, for they had outgrown their charters, though nominally organized under them." Cf. Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 84; Coxe, "Judicial Power and Unconstitutional Legislation" (Philadelphia, 1893), 177.

<sup>4</sup> Acts and Resolves of the General Assembly of Rhode Island, 1786-1787 (Ms.), 150.



representatives.<sup>1</sup> The adoption of this course has been ascribed to the fact that the majority in the assembly were opposed to the constitution, that they believed the people to be of the same mind, and that the agricultural class were generally unfriendly to it, though the townspeople were of the opposite sentiment.<sup>2</sup> Be this as it may, it can hardly be doubted that the assembly was unconsciously following colonial precedents. The fact that a majority of it was unfriendly to the proposed constitution would not alone have been sufficient to have suggested the plan followed. There were other states where similar sentiments were entertained by the party in power in the legislature, but this nowhere resulted in a formal plebiscitum.

The instructions received by the members from the people do not appear to have been numerous,<sup>3</sup> but a resolution was adopted providing for the submission of the proposed constitution to the people directly in their town meetings, and at the same time a proposal for calling a convention was defeated.

The election took place on March 24, 1788, and the result was the rejection of the instrument by a majority of more than ten to one.<sup>4</sup> This expression of opinion was not, however, a complete one. Indeed, the ballots cast represented less than half the enfranchised citizens of the state. This was largely due to the action of the Federalists, who desired to have the question determined by a convention, and in several of the towns the electors abstained from voting on the constitution and sent instructions and petitions for a convention instead.

The next instance of consulting the people was in reference to a letter which had been sent from New York to the other states proposing a convention to consider amendments to the Federal Constitution. It was by virtue of this plan that the New York legislature had been induced to ratify the original Constitution, and the letter now came before the Rhode Island body for action. It was referred to the towns and received the approval of but eight of them.<sup>5</sup>

<sup>1</sup> Acts and Resolves of the General Assembly of Rhode Island, 1786-1787 (Ms.), 150.

<sup>2</sup> See a valuable monograph by Dr. Bates, "Rhode Island and the Formation of the Union," Columbia University Studies (New York, 1898), Vol. X, Pt. II.

<sup>3</sup> Id. 163.

<sup>4</sup> The actual figures were 2708 against 237 in favor of adoption. See papers relating to the Adoption of the Constitution (Ms.), 16-37.

<sup>5</sup> Acts and Resolves of the General Assembly of Rhode Island, 1788-1789 (Ms.), 5-7; United States Chronicle, December 8, 1788.

Again, in the autumn of 1789, in the face of threatened hostile legislation on the part of Congress by reason of the continued aloofness of Rhode Island, the general assembly declared that its powers "are limited to the administration of the existing constitution of the state, and do not extend to devising or adopting alterations therein," and that it is "convinced that the freemen in this state retain in their own hands the entire power of adopting or rejecting the said constitution." Accordingly the people were again requested to instruct their representatives in the town meetings to be held on a uniform date in the ensuing October.<sup>1</sup> Finally, however, after numerous unsuccessful attempts to call a convention had been made, and after repeated, though not altogether satisfactory, consultations of the electorate, an act was passed, calling upon the people to assemble again in their town meetings, this time for the purpose of choosing delegates to a convention to be held March 1, 1790, for the purpose of considering the Federal Constitution.<sup>2</sup> Delegates were chosen at the appointed time and two of the towns again instructed, Portsmouth<sup>3</sup> for adoption and Richmond<sup>4</sup> for rejection.

One of the objections to the Federal Constitution was its lack of a Bill of Rights. When the convention met, a committee was appointed for the purpose of drafting amendments and also a Bill of Rights, and after these were reported by the committee the convention voted to submit them to the people, and it then adjourned until late in May.<sup>5</sup> No question seems to have arisen in the minds of these Rhode Island delegates but that the people should pass on the result of their labors. Nor were the latter slow in suggesting changes. The functions and powers of the Federal Senate and judiciary and the restriction of slavery were some of the subjects concerning which proposed amendments came from the towns.<sup>6</sup> During the interval of adjournment, also, some of the delegates took occasion to seek further instructions from their constituents. The commercial dangers of longer remaining outside of the Union reduced the ranks of the Anti-Federalists, and the assent of the convention to the Federal

<sup>1</sup> Acts and Resolves, 108.

<sup>2</sup> Id. 157. Cf. *Providence Gazette* for January 23, 1790.

<sup>3</sup> Papers relating to the Adoption of the Constitution of the United States, 95.

<sup>4</sup> Id. 99.

<sup>5</sup> Minutes of the Convention contained in Papers relating to the Adoption of the Constitution. See also *Providence Gazette* for March 13, 1790.

<sup>6</sup> Papers relating to the Adoption of the Constitution of the United States, 96-99.

Constitution was finally secured. But the act of ratification included also the proposed Bill of Rights, an amendment which the convention had framed in accordance with the express wishes of its constituents. The history of the adoption of the Federal Constitution shows no instance in which the people were so thoroughly and continuously consulted as in the case of Rhode Island.

It was suggested above that the colonial charter was, on the whole, satisfactory for state purposes. This is demonstrated by the numerous unsuccessful attempts to displace it during the first forty years of the nineteenth century. In 1824 a proposed constitution, framed by a convention and submitted to the people in accordance with Rhode Island tradition, was rejected,<sup>1</sup> and a movement to the same end ten years later proved abortive.<sup>2</sup> In 1841 two rival conventions met and instruments were submitted by them, but the state was involved in civil war over their validity,<sup>3</sup> and it was not until 1843 that a permanent state constitution was finally evolved. Into the details of these contests we need not enter, for we are here concerned only with the manner in which popular ratification itself was established, and it is clear that this result was accomplished for Rhode Island long before these later struggles. Her colonial experiences were repeated in the closing years of the eighteenth century, and, consciously or unconsciously, the Rhode Islanders of that period were following in the footsteps of their fathers.

### C. Connecticut

The state of Connecticut, like Rhode Island, had been unaffected by the movement for a new constitution which marked the Revolutionary era and had, as we have seen, continued in force its colonial charter.<sup>4</sup> By the latter part of the second decade of the nineteenth century popular sentiment had become so pronounced that however liberal this charter may have been for the colonial and Revolu-

<sup>1</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 649; Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 112.

<sup>2</sup> Jameson, 649; Maxey, *American Law Rev.* XLII, 566 *et seq.*

<sup>3</sup> Jameson, 649, sec. 226. See the case of *Luther v. Borden*, 7 How. (U.S.) 1, for a judicial review of this controversy.

<sup>4</sup> This was done by an act of the legislature expressly so declaring and at the same time promulgating a brief declaration of rights. See its text, Poore, "Charters and Constitutions," I, 257, 258.

tionary period, it was no longer adequate to the needs of a progressive modern state. A constitutional convention was accordingly called which met at Hartford on August 26, 1818.<sup>1</sup> The instrument framed by this body is distinguished by the introduction of the plan of proposing amendments by a vote of two successive legislatures.<sup>2</sup> The plan was not, however, strictly original with this body.<sup>3</sup> It had been foreshadowed in the Articles of Confederation which provided for amendments to be submitted by Congress and ratified by the state legislatures,<sup>4</sup> and a learned constitutional historian of Connecticut finds its germ in the system of amendment under the "Fundamental Orders."<sup>5</sup>

There seems to have been no discussion in this convention concerning the propriety of submitting the results of its labors to the people. The pursuit of that method was assumed as a matter of course. The lessons in popular law-making, learned by the people of Connecticut nearly two centuries before, had never been forgotten. There was, however, some debate as to the number which should be required to ratify, successive motions being made to require three-fifths, four-sevenths, and five-ninths, respectively.<sup>6</sup> These were all rejected, and the new instrument went to the people with the following provisions concerning the manner of ratification:—

"It shall be the duty of the Secretary forthwith to transmit seven hundred copies thereof to the town-clerk of the several towns in the State, which copies shall be apportioned among said towns according to their respective lists. The said Constitution shall, by said town clerk, be submitted to the consideration of the qualified voters in said towns for their approbation and ratification, on the first Monday in October next in the respective town-meetings legally warned for the purpose.

And that the number required to approve and ratify said Constitution be a majority of the qualified voters present and voting at such meeting to be con-

<sup>1</sup> See its Journal, printed by order of the General Assembly (Hartford, 1873).

<sup>2</sup> Connecticut Constitution (1818), Art. XI; Poore, "Charters and Constitutions" (Washington, 1877), 266.

<sup>3</sup> Borgeaud ("Adoption and Amendment of Constitutions," 147) speaks of it as "the result of a happy compromise" between the Massachusetts plan of submitting amendments by a convention and the Maryland system of amendments by a vote of two successive legislatures after a general election.

<sup>4</sup> Art. XIII; see Thayer's "Cases on Constitutional Law" (Cambridge, 1895), I, 220.

<sup>5</sup> Baldwin, "Modern Political Institutions" (Boston, 1898), 48.

<sup>6</sup> Journal of Connecticut Convention of 1818 (Hartford, 1873), 119, 120.

vened agreeably to the resolution of the General Assembly in such cases provided, passed at their session of May last."<sup>1</sup>

This constitution was adopted by a majority of something over 1500 in a total vote of more than 26,000, and, after being proclaimed by the governor became, and remained for over half a century, the fundamental code of Connecticut.

#### *D. Maine*

Meanwhile another New England community was applying and developing the practice of popular ratification. From the seventeenth century the region known as Maine was subject to the jurisdiction of Massachusetts.<sup>2</sup> Aside from the influence of the general course of events in the latter colony, there is at least one early instance, probably typical of many, of the employment of the covenant idea in the "province of Maine." On September 25, 1682, the members of the Baptist<sup>3</sup> Church at Kittery organized by adopting and subscribing an instrument,<sup>4</sup> in part reciting: —

"Wee whose names are here und<sup>e</sup> written doe solemnly & on good consideration, god Assisting us by his grace give up our selves to ye lord & to one another in Solemn Covenant, wherein wee doe Covenant & promise to walk with god & one with another In A dew and faithfull observance of all his most holy and blessed Commandm<sup>ts</sup>, Ordinances, Institutions or Appointments, Revealed to us in his sacred word of ye ould & new Testament."

Naturally enough, too, the town meeting was early transplanted to the northern province, and it was through this institution and in the course of the movement for separation from Massachusetts that the ideas of the covenant came to be applied to political affairs in Maine.

Judge Jameson, indeed, observes<sup>5</sup> that "the earliest official action relating to the proposed separation" was a Massachusetts act of 1819. But aside from the fact that the General Court passed a resolve to submit the question to the towns of Maine as early as 1816, and that a petition therefor was presented to that body in 1786,

<sup>1</sup> Journal of Connecticut Convention of 1818 (Hartford, 1873), 119, 120.

<sup>2</sup> McDonald, "The Government of Maine," 8 *et seq.*

<sup>3</sup> By this time the covenant had come into general use among Baptist as well as Congregational churches in America. See Burrage, "The Church Covenant Idea," 173.

<sup>4</sup> The full text is printed in Burrage, 181.

<sup>5</sup> "Constitutional Conventions," sec. 176.

the history of Maine itself discloses the repeated employment of the machinery of the town meetings, and appeals to the people on this question for an entire generation, surpassing in this respect even the parent state of Massachusetts.

During the Revolution the need of a separate government was felt by the people of Maine, and after its close this feeling was intensified by a desire for relief from the state debt of Massachusetts. As early as 1785 a meeting was held at Falmouth (now Portland), which issued an address to the towns.<sup>1</sup> Out of this came a delegate convention which assembled in 1786 and put forth a statement of grievances, and another in the same year which, besides issuing an address to the people, invited them to vote in their town meetings on the question of separation.<sup>2</sup> When the returns of the vote thus taken were counted it was found that only a little more than one-third of the towns had responded, but that of these three-fourths were in favor of separation, while the popular majority was nearly two-thirds.<sup>3</sup> This last convention also presented a petition to the General Court, praying for separation, but that body made some concessions which resulted in temporarily checking the movement.<sup>4</sup> A revival of the agitation and another reference of the question to the voters in the town meetings appears to have been made in 1802,<sup>5</sup> but it was not until the experiences of the second war with Great Britain had emphasized the necessity of uniting to form a strong government at home, that the separation movement was renewed in earnest.

As early as the beginning of 1816 petitions for separation began to be presented to the General Court,<sup>6</sup> and in February of that year it passed a resolve:—

"That it shall be the duty of the Selectmen of the several towns and districts, and of the Assessors of the several plantations within the district of Maine to issue their warrants, requiring the inhabitants of said towns, districts and plantations, respectively, who are qualified to vote in the choice of Senators in the General Court, to assemble on Monday, the 20th day of May next, and give in

<sup>1</sup> Williamson, "History of Maine," II, 526.

<sup>2</sup> Id.

<sup>3</sup> 645 out of 994. Id. 531.

<sup>4</sup> Id. 532.

<sup>5</sup> Goodrich, "Pictorial History of the United States," 369.

<sup>6</sup> See "Resolve on the petitions of sundry towns and individuals in the district of Maine, praying for a separation of that district from the other part of this state, 10th February, 1816." Massachusetts Resolves, Jan.-Feb. Sess., 1816, 148. There were petitions from 49 towns in their corporate capacity and from 2936 individuals. Williamson, "History of Maine," II, 663.

their written votes on the following question to-wit: 'Shall the Legislature be requested to give its consent to the separation of the District of Maine from Massachusetts proper, and to the erection of said District into a separate State?'— And it shall be the duty of said Selectmen and Assessors to receive and certify the whole number of votes given in at said meetings, respectively, by the voters qualified as aforesaid, for and against such separation, together with the whole number of qualified voters in such town, district or plantation."<sup>1</sup>

The vote was duly taken in the town meetings, and the returns disclosed that a large majority of those voting were in favor of separation, but that less than half the qualified electors had participated.<sup>2</sup> Nevertheless at the ensuing session in June of the same year, another act was passed, this time submitting to the Maine electors the question—

"Is it expedient that the District of Maine shall be separated from Massachusetts, and become an Independent State, upon the terms and conditions provided" therein.<sup>3</sup>

The act also provided for a convention to which the returns should be transmitted and which, in case the affirmative of the question should receive "a majority, of five to four at least," should proceed to frame a constitution.<sup>4</sup> This convention was duly chosen and met at Brunswick in 1816. The returns from the town meetings disclosed a majority of something over 1600 in a total vote of 22,316, but the committee which examined them endeavored to show a compliance with the enabling act by reporting that the aggregate majority of yeas in the towns was, to the aggregate majority of nays, in the ratio of five to four. When this report was placed before the General Court, it was referred to a committee which expressed its "full conviction, that the Convention have misconstrued the act by which their powers were defined: That the word 'majority' refers to the majority of votes returned, and not to the aggregate of local and municipal majorities."<sup>5</sup> It further declared:—

"Massachusetts will be anxious for no union which does not spring from mutual affection and a sense of common interest. But in the ordinary course of legislation, questions involving merely the division of a parish or a town, are rarely agitated more than once in the same political year. Should then the same Legislature which has once, and so lately, adjusted the principles, and, with

<sup>1</sup> Massachusetts Resolves, Jan.-Feb. Sess., 1816, p. 148.

<sup>2</sup> The vote was 10,393 yeas to 6501 nays, while the total electorate numbered 37,828.

<sup>3</sup> Massachusetts Resolves, June Sess., 1816, cf. Williamson, 663.

<sup>4</sup> Id. Nov.-Dec. Sess., 1816, p. 318.

<sup>5</sup> Id. 318, 319.

great deliberation, fixed the terms and conditions, which appertain to the dismemberment of the State, revise the fundamental provisions of its act without any new occasion, they might be considered as betraying an undue solicitude to accelerate the partition, and as regardless of the feelings and interest of a large and respectable class of their fellow-citizens."<sup>1</sup>

The General Court thereupon:—

*Resolved*, That the contingency upon which the consent of Massachusetts was to be given for the Separation of the District of Maine has not happened; and that the powers of the Brunswick Convention to take any measures tending to that event, have ceased.

*Resolved*, That it is not expedient for the present General Court to adopt any further measures in regard to the separation of the District of Maine."<sup>2</sup>

In 1819, however, consideration of the question was resumed, and in June of that year an act was passed by the General Court reciting that "it has been represented to this legislature that a majority of the people of the district of Maine are desirous of establishing a separate and independent government," authorizing the question again to be submitted in the town meetings, but this time fixing the requisite majority in favor of separation at but 1500, providing for a constitutional convention, and requiring its work to be submitted to the voters.<sup>3</sup> The reduced majority required for the proposal insured its adoption, for it was less than the majority returned three years before. The freemen having declared in their town meetings for separation, delegates were chosen to a convention which met at Portland in the following October, and framed a constitution which was submitted to and ratified by the people by a large majority.<sup>4</sup>

Thus through a third of a century of experiment and effort — after no less than five consultations of the people — was evolved the constitution of Maine. By reason of its provisions, as well as of its history, it is a notable instrument. For though modelled largely upon that of the parent state,<sup>5</sup> it marks a distinct advance in the development of popular ratification, especially with reference to future amendments. We have seen that in Massachusetts and New Hampshire constitutional changes were left to the cumbrous method of

<sup>1</sup> Massachusetts Resolves, Nov.-Dec. Sess., 1816, 321.

<sup>2</sup> *Id.* 322.

<sup>3</sup> Massachusetts Laws, May-June Sess., 1819 (Boston, 1819), Chap. CLXI.

<sup>4</sup> Williamson, "History of Maine," II, 674.

<sup>5</sup> "Retiring to a commodious room they laid before them that [constitution] of the commonwealth, marked the acceptable parts, and reported a new one to the Convention, by portions, as they proceeded with a finished draft." *Id.* 673, 674.



proposal by a convention, while in Connecticut and Alabama the assent of two successive legislatures was required. The method prescribed by this new constitution of Maine was as follows: —

"The legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to this constitution; and when any amendment shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution."<sup>1</sup>

This, it will be seen, greatly simplified the plan of amendment and brought it nearer to the people. But a still more important advance was that relating to the vote required in order to ratify. Of the preceding constitutions which had provided for popular ratification at all, that of Massachusetts required, for the approval of amendments, "two thirds of the qualified voters throughout the state";<sup>2</sup> Kentucky,<sup>3</sup> and after it Alabama,<sup>4</sup> required a majority of those voting for representatives. And while the New Hampshire constitution of 1792 permitted ratification by two-thirds of those "present and voting on the subject,"<sup>5</sup> it required a full majority of those present and voting at the town meetings in order to authorize the calling of a convention, which could propose amendments.<sup>6</sup> The Maine plan may have been suggested by the New Hampshire provision, but its adoption seems more likely to have resulted from the experience of Maine in her long struggle for independent government. For at least twice during that period pronounced majorities had been returned in favor of separation, only to be nullified by the indifference of non-participants. The new plan removed this impediment to popular action, and left the question of future changes to be decided by those who were sufficiently interested to express their sentiments thereon.

Nor has this innovation resulted in frequent or ill-advised changes

<sup>1</sup> Maine Constitution, Art. X, sec. 4.

<sup>2</sup> Original Constitution, Chap. VI, Art. X.

<sup>3</sup> Kentucky Constitution, 1791, Art. XI, sec. 1.

<sup>4</sup> Alabama Constitution, 1819, amendment clause.

<sup>5</sup> Sec. 99.

<sup>6</sup> *Id.*

in the organic law of Maine. The constitution with which that state entered the Union is, with comparatively slight and unimportant changes, its constitution to-day. There have been more than thirty amendments in the intervening years,<sup>1</sup> but none of these have been radical, most, if not all, have been beneficial, and some have indicated a high degree of enlightenment.<sup>2</sup> So satisfactory, indeed, has proved this plan of amendment by direct submission and approval of the interested voters that the people of Maine have never seen fit to call a second constitutional convention.<sup>3</sup> The organic law of the "Pine Tree State" affords one of the best examples of the permanency of a constitution rooted and grounded in, as well as developed by, the consent of the people.

### *E. Other States*

The Massachusetts constitution remained unchanged for forty years. By 1820, however, the need of some revision was generally felt, and, in accordance with the plan prescribed by the existing instrument, delegates were chosen to a convention to frame amendments. It assembled in Boston in the autumn of that year and submitted fourteen proposed amendments, only nine of which were ratified.<sup>4</sup> One <sup>5</sup> of these, however, abolished the cumbrous method of amendment by convention only, and substituted one more like the Connecticut system, then recently adopted, though still requiring a two-thirds vote on the part of the lower house in order to submit a proposal. At the same time the two-thirds majority required for ratification was reduced by adopting substantially the Maine provision permitting amendments to be "ratified by a majority vote of the qualified voters voting thereon."<sup>6</sup> The people of Massachu-

<sup>1</sup> McDonald, "The Government of Maine," 26, 27; *post*, 366.

<sup>2</sup> *E.g.* that imposing the educational qualification for electors. *Id.* 27.

<sup>3</sup> A "constitutional commission" which proposed amendments was appointed by the governor in 1875, but this was not only extra-constitutional, but also without legislative authority. See McDonald, 26, 27. Cf. Jameson, "Constitutional Conventions," 652.

<sup>4</sup> Journal of the Debates and Proceedings of the Convention to revise the Constitution of Massachusetts (2d Ed., Boston, 1853), 634.

<sup>5</sup> Art. IX.

<sup>6</sup> These features are still retained. Massachusetts Constitution, Articles of Amendment IX; Revised Laws (Boston, 1902), 41; Poore, "Charters and Constitutions," I, 974.

setts had been learning from the constitutional experience of the states around them. Another of these amendments provided for the establishment of municipal governments, but only "with the consent and on the application of a majority of the inhabitants of such town, present and voting thereon."<sup>1</sup>

In 1903 the General Court adopted a Resolve,<sup>2</sup> providing for the submission of amendments to the constitution upon the petition of fifty thousand voters, and with the approval of fifteen members of the Senate and a majority of the representatives. The proposal was not, however, agreed to by the succeeding General Court in accordance with existing requirements.

The adoption of a constitution in Rhode Island left Vermont as the only New England state without a popularly ratified fundamental code. That state's original constitution had been proclaimed in 1777 by the convention which framed it, and while this course occasioned some criticism at the time,<sup>3</sup> and the defect was sought to be remedied by acts of the legislature,<sup>4</sup> none of the subsequent constitutions or amendments were submitted. Borrowing from Pennsylvania the system of a Council of Censors,<sup>5</sup> the early Vermonters provided that this body should have the sole power of calling constitutional conventions and proposing amendments, leaving to the convention merely the option to accept or reject.<sup>6</sup> Thus, while all the other states were adopting the democratic plan of constitution-making, Vermont continued to employ the eighteenth-century method.<sup>7</sup> Finally in 1870 a convention which met at Montpelier<sup>8</sup> adopted several amendments, one of which abolished<sup>9</sup> the Council of Censors, and another provided as follows:—

<sup>1</sup> Art. II.

<sup>2</sup> Massachusetts Acts and Resolves, 1903, p. 583.

<sup>3</sup> Objections were offered from Bennington. Allen, "History of Vermont," 108-110; Collections Vt. Hist. Soc. I, 391.

<sup>4</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1877), sec. 154. "There was a general feeling though that it was not the correct procedure, but the long boundary contests in which she had been engaged with Massachusetts, New Hampshire, and especially New York, made it seem unwise to take the risk of consulting the people." — Oberholtzer, "Law Making by Popular Vote," *Annals American Academy of Political and Social Science*, II, 327.

<sup>5</sup> Jameson, sec. 155; Revised Laws of Vermont (Rutland, 1881), 50.

<sup>6</sup> Constitution of 1793, Chap. II, sec. 43; Poore, II, 1887; Revised Laws, 42.

<sup>7</sup> Jameson, 648, 649, secs. 217, 220.

<sup>8</sup> See its Journal (Burlington, 1870).

<sup>9</sup> Art. XXV, sec. 4; Poore, II, 1887; Revised Laws, 49.

"At the session of the General Assembly of this state, A.D. 1880, and at the session thereof every tenth year thereafter, the Senate may, by a vote of two thirds of its members, make proposals of amendment to the Constitution of the State, which proposals of amendment if concurred in by a majority of the members of the House of Representatives, shall be entered on the journals of the two houses and referred to the General Assembly then next to be chosen, and be published in the principal newspapers of the state; and if a majority of the members of the Senate and of the House of Representatives of the next following General Assembly shall respectively concur in the same proposals of amendment, or any of them, it shall be the duty of the General Assembly to submit the proposals of amendment so concurred in to a direct vote of the freemen of the state; and such of said proposals of amendment as shall receive a majority of the votes of the freemen voting thereon shall become a part of the Constitution of this state."<sup>1</sup>

This, however, was but an eddy in the current of New England's constitutional development. The Massachusetts convention of 1820 had practically taken the final step in extending a simplified system of popular ratification throughout New England.

<sup>1</sup> Art. XXV; Revised Laws, 49.

## CHAPTER XIV

### POPULAR RATIFICATION IN THE SOUTH

#### *A. Southern System Indigenous*

WHILE popular constitution-making was thus being perfected in New England, colonial experience in popular legislation was bearing fruit in the South. There seems to be a vague notion in some quarters that the latter section merely followed the former and borrowed its completed system. Thus Dr. Borgeaud says,<sup>1</sup> "The South was not slow in imitating the example of the North, and following in its turn the evolution of popular government." But where is the evidence of its "imitating the example of the North"? Means of communication were slow and primitive when this "evolution" began in the South, and the interchange of ideas between distant and not altogether friendly sections was neither easy nor common. Besides, as we shall find later, the Southern constitutions of that period have an individuality of their own; while resembling each other, they are, on the whole, materially different from those produced in the corresponding period at the North.

But it is unnecessary to seek a foreign origin for institutions and customs whose germs may easily be found at home. We have followed the course of popular legislation in the South up to the midst of the Revolutionary War; why should we look elsewhere for the source of popular constitution-making? While the popular constitutions of New England may be traced back to its town compacts and legislation of the seventeenth century, those of the South are even more closely connected with the "associations" of the Carolinas and the covenants of the mountaineers. Even more closely, because in the South the two movements were separated by a few years at most, and the first Southern constitution to provide for an appeal to the

<sup>1</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 161, 162.

people appeared in a state where some of the latest of these experiments in popular legislation were made.

### *B. Kentucky*

While the source of Kentucky's institutional development is thus apparent, the formal authority for its first constitution came not from the people, whose early lessons in self-government we have already followed, but from the legislature of Virginia, of which commonwealth Kentucky at first formed a part. That body in 1789 passed an act providing for a convention to meet at Danville, Kentucky, "with full power and authority to *frame and establish* a fundamental constitution of government for the proposed State."<sup>1</sup> The body which assembled in 1792, pursuant to this act, made this "compact with the state of Virginia" a part of the instrument which it framed<sup>2</sup> and exercised the power thus conferred "to establish" a constitution. But while in this feature the convention followed the Virginia law by which it doubtless felt bound, it at the same time took a step which showed that early Kentucky precedents were not without influence. The new instrument contained the following provision relative to future constitutional changes:—

"That the citizens of this State may have an opportunity to amend or change this constitution in a peaceable manner, if to them it shall seem expedient, the persons qualified to vote for representatives shall, at the general election to be held in the year one thousand seven hundred and ninety seven, vote also, by ballot, for or against a convention, as they shall severally choose to do; and if thereupon it shall appear that a majority of all the citizens in the State voting for representatives have voted for a convention, the general assembly shall direct that a similar ballot shall be taken the next year; and if thereupon it shall also appear that a majority of all the citizens in the State voting for representatives have voted for a convention, the general assembly shall, at their next session, call a convention to consist of as many members as there shall be in the house of representatives, to be chosen in the same manner, (at the same places and at the same time that representatives are), by the citizens entitled to vote for representatives, and to meet within three months after the said election for the purpose of readopting, amending or changing this constitution. If it shall appear upon the ballot of either year that a majority of the citizens voting for the representatives is not in favor of a convention being called, it shall not be done until two-thirds of both branches of the legislature shall deem it expedient."<sup>3</sup>

<sup>1</sup> Bullitt and Feland's *Kentucky General Statutes* (Louisville, 1887), 55.

<sup>2</sup> *Id.* 66.     <sup>3</sup> Art. XI, *id.* 67; Poore's "Charters and Constitutions," I, 654.

Here, then, we have the first instance, outside of New England, of an American state providing for a *plebiscitum* on a constitutional question, and even in New England up to this time only the states of Massachusetts and New Hampshire had consulted the people directly with reference to their constitutions. The movement in the South for a people's constitution, though of distinct and subsequent origin and less perfect in achievement, was not much later in point of time than that of New England.

Nor was this epoch-making clause in the new instrument merely a paper declaration. When the time fixed for consulting the people arrived, the question of calling a convention was submitted, and a clear majority of the votes regularly returned was in favor of the proposal.<sup>1</sup> Here again Kentucky was in the van. Not only in providing for the participation of the people, but in actually consulting them, it led all the states except Massachusetts and New Hampshire.

The second reference to the people as required by the constitution was made in 1798, with the result that a still larger majority for a convention was disclosed,<sup>2</sup> though the returns were both times incomplete. In the following year, delegates were accordingly chosen, and the convention met at Frankfort and proceeded to "ordain and establish"<sup>3</sup> a constitution. The provision as to future constitutional changes was retained in substance, including the double consultation of the electorate, except that the latter could be made at any session of the legislature, and was not limited, as in the first instrument, to a single year.<sup>4</sup> The Kentucky constitution-makers appear to have thought that since the people were twice consulted in calling the convention, its labors would not need a review at their hands.

The constitution of 1799 was a more democratic instrument than its predecessor. It abolished the electoral college, apparently borrowed from Maryland,<sup>5</sup> which chose not only the senators as in the last named state, but also the governor, and these officials were made elective. The instrument appeared also to be satisfactory to the people, for it was not until almost a half century later that advantage was taken of the right to appeal to them for a new constitution. In

<sup>1</sup> It received 5446 out of a total of 9814. Collins, "History of Kentucky" (Louisville, 1877), 845.

<sup>2</sup> On the face of the returns there were 8804 in favor of a convention out of a total of 11,853. Eight counties failed to vote and two others neglected to make returns. *Id.*

<sup>3</sup> Preamble.

<sup>4</sup> Art. IX.

<sup>5</sup> See *post*, 230.

1847 and 1848 the question was submitted, and the result each time was a large majority in favor of a convention.<sup>1</sup> The legislative act in pursuance thereof did not, however, require the submission of the instrument to be framed, but merely called the convention for the purpose mentioned in both preceding instruments of "re-adopting, amending or changing the constitution."<sup>2</sup> Nevertheless the convention that met at Frankfort in 1850, influenced, no doubt, by the example of other Southern states as well as by its own early precedents, submitted its work to the people, who expressed their approval by no uncertain majority.<sup>3</sup> It is true that the convention afterward reassembled and adopted certain amendments,<sup>4</sup> but the main part of the instrument was passed upon by the voters, and Kentucky thus added actual popular ratification to its long experience in consulting the people. The state has ever since adhered to this practice, and the present constitution, which was ratified by the voters in 1891, provides<sup>5</sup> for submitting all amendments and proposals for conventions, though it does not expressly require popular approval for future constitutions.

### C. Tennessee

We have already followed the constitutional development of the trans-Allegheny settlements of Tennessee up to the close of their period of local constitution-making. This was succeeded by an era of territorial government, in which, for about seven years, the region formed "the territory of the United States of America south of the river Ohio."<sup>6</sup> In November, 1795, William Blount, governor of this

<sup>1</sup> In 1847, 92,639 out of 137,311; in 1848, 101,828 out of a total of 141,620. Collins, "History of Kentucky," 890.

<sup>2</sup> Kentucky Acts, 1848-1849 (Frankfort, 1849), Chap. XXXVII, sec. 1.

<sup>3</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 650. The vote for the constitution was 51,351 out of 91,955. Collins, "History of Kentucky," 893.

<sup>4</sup> "It is said that the convention of 1849 and 1850 after submitting their work to the people, made material amendments to that constitution as ratified by the people. That is true; but the convention of 1849-1850 had that power, because their agency was unlimited; the people did not restrict them in their agency." *Miller v. Johnson*, 92 Ky. 604.

<sup>5</sup> Kentucky Constitution, 1891, secs. 256-258.

<sup>6</sup> Ramsey, "Annals of Tennessee" (Philadelphia, 1860), Chap. VII. The Act providing for its government was approved May 26, 1790. See Poore, "Charters and Constitutions," II, 1667.



territory, called an election for delegates to a convention, "for the purpose of forming a constitution or permanent form of government."<sup>1</sup> The convention met at Knoxville in January, 1796, and among its distinguished members were Andrew Jackson, future president of the United States, and James Robertson, veteran framer of the compacts of Watauga and Nashborough. These earlier documents evidently influenced the convention in framing its draft, for some of their most peculiar provisions were retained,<sup>2</sup> while others were proposed and discussed.<sup>3</sup> In form also the new instrument strongly resembled the primitive covenant. Its preamble recites that

"We the people . . . do ordain and establish the following constitution . . . and do mutually agree with each other to form ourselves into a free and independent state."

And it closes with the recital:—

"In testimony hereof, we have hereunto subscribed our names."

Indeed, Jefferson declared this instrument "the least imperfect and most republican" of the state constitutions.

The Knoxville convention did not actually submit its work to the voters,<sup>4</sup> but it provided for consulting them in the future with reference to constitutional changes, by adopting this clause:—

"That whenever two-thirds of the general assembly shall think it necessary to amend or change this constitution, they shall recommend to the electors, at the next election for members to the general assembly, to vote for or against a convention; and if it shall appear that a majority of all the citizens of the State, voting for representatives, have voted for a convention, the general assembly shall, at their next session, call a convention to consist of as many members as there be in the general assembly, to be chosen in the same manner, at the same place and by the same electors that chose the general assembly, who shall meet within three months after the said election, for the purpose of revising, amending or changing the constitution."<sup>5</sup>

This, it will be seen, is a distinct advance beyond the Kentucky provision of four years previous, for it brings the system nearer the

<sup>1</sup> Ramsey, 649.

<sup>2</sup> Such as the exclusion of ministers and atheists from office, Art. VIII; Poore, "Charters and Constitutions," II, 667.

<sup>3</sup> Ramsey, 654.

<sup>4</sup> Doubtless a full report of its proceedings would throw much light on the reasons for this. But unfortunately "the debates of the convention are not given in the Journal and are not to be found elsewhere." — Ramsey, 652.

<sup>5</sup> Art. X, sec. 3; Poore, II, 1673.

people by dispensing with the second submission, nor was the privilege limited to a single instance. We shall find this Tennessee plan widely adopted by the states both South and North.

The next generation saw popular constitution-making firmly established in Tennessee. In 1833, the legislature passed an act calling a convention to meet the following year, "for the purpose of revising, amending or altering the present, or forming a new constitution."<sup>1</sup>

The constituent act itself made no provision for submitting to the people the constitution to be framed by this body. But a separate resolution was adopted which embodied the principle, and its language is significant.

"Whereas," it recites, "the history of our country has taught us that too much caution cannot be exercised when we are brought to act upon a subject of such importance, and likely to change the whole features of our State government; and, in order better to secure and protect the rights of the people, and to retain the balance of power in their hands, and that a fair and full expression may be had of their approbation of the provisions of the next constitution; it is therefore

*"Resolved, by the General Assembly of the State of Tennessee,*

*"That it is the opinion of this General Assembly, and they hereby most respectfully recommend to the people to urge upon the candidates for the convention in the several districts, and upon the delegates elected to said convention, that when the new constitution shall have been formed, it shall be submitted back to the people to receive their sanction by a majority of the votes in the State, before it shall become the established constitution."*<sup>2</sup>

The instrument thus framed received the assent of the electors by a vote of considerably more than two to one,<sup>3</sup> and the policy thus renewed has since been uniformly followed.

On the eve of the Civil War, the legislature in referring to the people the question of calling a convention, provided that no action toward a change of relations with the Union should be valid until ratified by a vote equal to a majority of that cast at the preceding gubernatorial election.<sup>4</sup> And even after the commencement of hostili-

<sup>1</sup> Tennessee Laws of 1833 (Nashville, 1833), Chap. LXXVI.

<sup>2</sup> Id. 123, 124.

<sup>3</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 650.

<sup>4</sup> Tenney, "Military and Naval History of the Rebellion in the United States," 44 *et seq.* The proposal to call such a convention was defeated by a vote of 12,000. Id.

ties, when the state was practically in the hands of the military, the legislature, which in special session sat in secret, after voting to enter into a military league with the Confederacy, still felt compelled to submit the secession ordinance to a popular vote.<sup>1</sup>

Thus the results of the work of the pioneers of Tennessee, as evidenced by the several instruments which are themselves the pioneer American constitutions, are seen in the later history of the commonwealth. For it was not accidental that the state which became the successor of Watauga, Nashborough and Franklin has, with one exception, submitted each of its five constitutions to its people, and, longest continuously of any Southern state, has adhered to the actual practice of popular ratification.

#### D. *Mississippi*

We have already caught a glimpse<sup>2</sup> of the constitutional beginnings of Mississippi. In 1798, the region was erected into a territory of the United States<sup>3</sup> and remained in that condition for nearly a score of years. But in 1817, Congress passed an act authorizing it to become a state.<sup>4</sup> This "enabling act" was one of a series passed during that period,<sup>5</sup> which practically precluded the employment of popular ratification by authorizing a convention "to form a constitution and state government."<sup>6</sup> Delegates were elected in June, 1817, and in the following month the convention assembled at the town of Washington, near Natchez.<sup>7</sup>

The instrument framed by this body bears traces of the political philosophy of its early settlers, and shows an imitation of the Tennessee instrument. The first section declared "that all freemen, when they form a social compact, are equal in rights,"<sup>8</sup> while both unbelievers and ministers are disqualified from office-holding<sup>9</sup> after the manner of the "Frankland" instrument.<sup>10</sup> The constitution was not

<sup>1</sup> Tenney, "Military and Naval History of the Rebellion in the United States," 44 *et seq.*

<sup>2</sup> *Ante*, Chap. VIII.

<sup>4</sup> *Id.* 1052.

<sup>3</sup> Poore, "Charters and Constitutions," II, 1049.

<sup>6</sup> See *post*, Chap. XIX.

<sup>5</sup> Enabling Act, sec. 4; Poore, II, 1053.

<sup>7</sup> There were forty-seven delegates, among whom was Joseph E. Davis, an older brother of Jefferson Davis. — Lowry and McArdle, "History of Mississippi" (Jackson, 1891), 236.

<sup>8</sup> Poore, II, 1054.

<sup>9</sup> *Id.* 1063; Art. VI, secs. 7, 8.

<sup>10</sup> *Ante*, 127.

submitted to the people,<sup>1</sup> but the Tennessee plan of consulting them was incorporated almost *verbatim* into the new instrument,<sup>2</sup> and a few years later the people were given the opportunity of applying it. This constitution, with all its democratic features, restricted the suffrage to taxpayers,<sup>3</sup> required the governor to be a freeholder,<sup>4</sup> and

<sup>1</sup> There has been considerable discussion of this point, but the conclusion stated in the text is supported by the overwhelming weight of the evidence. Mr. Poore makes the statement that this constitution was submitted ("Charters and Constitutions of the United States" (Washington, 1877), II, 1054, note). A similar statement is made by Judge Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1877), 497, note, 651, and Professor Thayer, "Cases on Constitutional Law" (Cambridge, 1895), I, 251, note.

On the other hand, in the convention which framed the present constitution of Mississippi (1890), the committee on Judiciary presented a report in which it was declared :—

"The doctrine (of the necessity of popular ratification) has never prevailed in this state and has here no sanction from usage. The state was admitted to the union, 1817, with a constitution made final and absolute by the convention which framed it."—Journal of the Mississippi Constitutional Convention (Jackson, 1890), 149.

So the Supreme Court of Mississippi in a celebrated case bases its argument and decision in part upon the premise that the only constitution of Mississippi which had been submitted to the people was that adopted in the reconstruction era. The opinion states :—

"The general judgment of the people of our own state has practically and strikingly repudiated the theory from the foundation of the government. The usage in Mississippi, with a solitary exception in an extraordinary conjuncture of public affairs, gives it no support. That the government has lived from its birth to this hour with no valid fundamental law on which to rest, except for a brief interval, cannot be true."—*Sproule v. Fredericks*, 69 Miss. 905.

Moreover, even counsel who were contending in that case for the necessity of submission, expressly admitted in their argument that "neither the constitution of 1817, nor that of 1832, was submitted for ratification." (Id. 903.)

Lowry and McArdle, in their account of the convention ("History of Mississippi," 237-241), make no mention of any attempt at submission, while another local historian expressly declares :—

"No proposition was made in the Convention to submit the Constitution to a vote of the people for ratification. It went into effect on the day it was signed, August 15, 1817. The original is in the office of the Secretary of State."—J. L. Power, Secretary of State, in "Chapters on State History" in *Magnolia Gazette*, September 1, 1897, quoted in Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 112.

Both Borgeaud ("Adoption and Amendment of Constitutions," Hazen's Trans., New York, 1895, 150) and Oberholtzer ("The Referendum in America," 2d Ed., New York, 1900, 112) base their argument that no actual instance of popular ratification, outside of New England, occurred during this period, on the premise that this first Mississippi constitution was merely proclaimed, and this view seems to be supported by the clear preponderance of the evidence.

Added to the foregoing is the fact that the enabling act not only did not authorize, but by implication, at least, forbade submission.

<sup>2</sup> Poore, II, 1064.

<sup>3</sup> Art. III, sec. 1; Poore, II, 1056.

<sup>4</sup> Art. IV, sec. 3; Poore, II, 1059.

provided for the appointment of judges.<sup>1</sup> By 1830, these and other features had created considerable sentiment in favor of revision,<sup>2</sup> and in that year the General Assembly passed an act by which the people were "recommended" to vote on the question of calling a convention.<sup>3</sup> The poll being favorable, another act was passed providing for the convention, and delegates were duly chosen who assembled at Jackson in September, 1832. This convention seems to have devoted itself mainly<sup>4</sup> to eliminating the objectionable features of the instrument of 1817, but it also marks a distinct advance in the development of popular ratification in Mississippi. One of the delegates, Quitman by name, "the day before the Constitution was adopted, offered an amendment in the shape of a resolution, submitting that instrument to the vote of the people for their ratification or rejection. This proposition was lost by nays twenty-six to nineteen yeas."<sup>5</sup> But though popular ratification was not provided for that instrument, notwithstanding nearly one-half of the delegates expressed a desire therefor, the convention established that system for the future by incorporating the following provision:<sup>6</sup> —

"Whenever two-thirds of each branch of the legislature shall deem any change, alteration, or amendment necessary to this constitution, such proposed change, alteration or amendment shall be read and passed by a majority of two-thirds of each house respectively, on each day, for three several days. Public notice thereof shall then be given by the secretary of state, at least six months preceding the next general election at which the qualified electors shall vote directly for or against such change, alteration or amendment; and if it shall appear that a majority of the qualified electors voting for members of the legislature shall have voted for the proposed change, alteration or amendment, then it shall be inserted by the next succeeding legislature as a part of this constitution, and not otherwise."

This was evidently copied after the Alabama provision which had been adopted in 1819, but was an improvement on the latter, in making the work of the second legislature entirely perfunctory, and leaving the real ratification to the people. Under this plan several amendments to the constitution of 1832 were adopted.<sup>7</sup> But this was the high-water mark of popular ratification in Mississippi. With the anti-slavery agitation and the approach of the war, the movement was checked even more abruptly than in the other states of the South.

<sup>1</sup> Art. V, sec. 2, Poore, II, 1061.

<sup>2</sup> Lowry and McArdle, "History of Mississippi," 266, 271.

<sup>3</sup> Id. 267.

<sup>4</sup> Id. 272.

<sup>5</sup> Id.

<sup>6</sup> Poore, "Charters and Constitutions," II, 1077, 1078.

<sup>7</sup> Id. II, 1078, 1079.

The secession amendments of 1861 were not submitted, nor were those of 1865.<sup>1</sup> The reconstruction instrument of 1868, submitted under the compulsion of the Federal government, was at first rejected, but upon a second submission was adopted.<sup>2</sup> When, however, the limitations imposed by that instrument upon restriction of the suffrage<sup>3</sup> had expired, Mississippi led the way in the retrogressive Southern movement for unsubmitted constitutions.<sup>4</sup>

### *E. Alabama*

Upon the admission of Mississippi, in 1817, the region to the east of it was organized as a territory under the name of Alabama.<sup>5</sup> Two years later it was admitted as a state. Its enabling act,<sup>6</sup> like others of that period, leaving it to a convention "to form a constitution," delegates elected to this body met at Huntsville in the summer of 1819.

The new commonwealth was then being settled by immigrants from neighboring states,<sup>7</sup> and the convention roll<sup>8</sup> shows the names of none who were not, apparently, of American birth. Among the delegates was William R. King, afterward Vice-President of the United States. He was of Scotch-Irish and Huguenot ancestry, a lawyer by profession, and, having been a member of Congress from North Carolina,<sup>9</sup> soon became prominent in the affairs of his adopted state. In the convention he was a member of the committee to frame the constitution, and was one of a subcommittee of three appointed to reduce it to form.<sup>10</sup>

Another prominent member of this committee was Clement C. Clay, a Virginian by birth, but reared in eastern Tennessee, where he was educated and admitted to the bar.<sup>11</sup>

The instrument which these men prepared was not submitted to

<sup>1</sup> Poore, II, 1079, and note.

<sup>2</sup> Id. 1081, note. It is interesting to note that this document retained the amendment clause (Art. XIII) of 1832, except that voting on separate amendments was expressly authorized.

<sup>3</sup> *I.e.* forbidding any property or educational test prior to 1885, Art. XIV, Poore, II, 1094.

<sup>4</sup> See *post*, Chap. XX.

<sup>5</sup> Pickett, "History of Alabama" (Charleston, 1851), II, 374; Poore, "Charters and Constitutions," I, 27.

<sup>6</sup> Poore, I, 29.

<sup>7</sup> Pickett, "History of Alabama," II, 385.

<sup>8</sup> Id. 401, 402.

<sup>9</sup> Id. 410.

<sup>10</sup> Id. 412, 413.

<sup>11</sup> Id. 418, 419.

the people. But it enjoys the distinction of being the first constitution outside of New England to provide for the submission of future amendments. This provision was as follows:—

"The general assembly whenever two-thirds of each house shall deem it necessary, may propose amendments to this constitution, which proposed amendments shall be duly published in print, at least three months, before the next general election of representatives, for the consideration of the people, and it shall be the duty of the several returning officers, at the next general election which shall be held for representatives, to open a poll for, and make a return to the secretary of state for the time being of, the names of all those voting for representatives, who have voted on such proposed amendments, and if thereupon it shall appear that a majority of all the citizens of this state, voting for representatives, have voted in favor of such proposed amendments, and two-thirds of each house of the next general assembly, shall, after such an election, and before another, ratify the same amendments by yeas and nays, they shall be valid, to all intents and purposes, as part of this constitution."<sup>1</sup>

Borgeaud says of the above provision:—

"The constitution-framers of Alabama, more familiar with the strategies of the Indians than with the distinctions of political science, thought they could unite the Connecticut plebiscite and the general election of Maryland."<sup>2</sup>

It is by no means certain, however, that this plan was borrowed, even in part, from Connecticut. It differs materially, both in phraseology and details from that of the New England instrument, and was more probably a development of the Kentucky plan,<sup>3</sup> and an application thereof to amendments instead of to the calling of conventions. In spite of the cumbrous requirement of legislative, after popular, approval, amendments were ratified<sup>4</sup> in 1830, 1846, and 1850, but another, submitted at the session of 1844-1845 and approved by the people, was declared invalid by reason of a technical error in the subsequent act.<sup>5</sup> Indeed, this constitution met the needs of Alabama until the reconstruction period. Neither secession<sup>6</sup> nor civil war had

<sup>1</sup> Constitution of 1819, Supplement to Art. VI; Poore, "Charters and Constitutions," I, 44.

<sup>2</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 148.

<sup>3</sup> A comparison of the provision with that of Kentucky (see *ante*, 205) will disclose considerable similarity in language. Note, *e.g.* the requirement for ratification by a "majority of all the citizens . . . voting for representatives."

<sup>4</sup> Poore, I, 46, 47.

<sup>5</sup> See *Collier v. Frierson*, 24 Ala. 100.

<sup>6</sup> The convention of 1861 merely passed an ordinance of secession and made such changes "as were rendered necessary by the transfer of allegiance." Poore, I, 48, note.

the effect of displacing it and while the ordinance of secession did not go before the people, there was a strong movement to send it there.<sup>1</sup> And so thoroughly did the plan of popular ratification become established, that all subsequent constitutions except the short-lived instrument of 1865 have been submitted to the people.<sup>2</sup> Even in 1901, during a reactionary movement in which her neighbors were proclaiming new constitutions, Alabama submitted hers to an electorate, part of whom were to be disfranchised thereby.

There is no more creditable chapter in the history of popular ratification in Alabama than that contributed by this, its most recent convention, which assembled at Montgomery in May, 1901. Although the proposal was made early in its deliberations to proclaim its work in force without a submission to the people, this was repudiated, and not only was the enabling act followed by referring the new instrument to the people, but the provisions which that act required to be inserted in the constitution were, in the main, incorporated.<sup>3</sup> The fact that nearly two-thirds of the members were lawyers<sup>4</sup> probably explains why the course followed was so different from that of the contemporary Virginia convention, composed largely of laymen who were not so likely to feel themselves bound by precedent or legislative enactment.<sup>5</sup> The convention appears to have taken a somewhat backward step by endeavoring to empower future conventions to perform such acts as they might deem necessary in revising the constitution.<sup>6</sup> But the history of Alabama, like that of Tennessee, shows on the whole a consistent and commendable adherence to the policy of appealing to the people, so clearly recognized in its first fundamental code.

<sup>1</sup> In the convention, called without previous consultation of the people, and meeting January 7, 1861, at Montgomery, a proposal to submit its action to a popular vote was defeated. "Nicholas Davis of Huntsville declared his belief that the people of North Alabama would *never abide the action of that convention if denied the right of voting upon it*. Mr. Yancy thereupon denounced the people of North Alabama as traitors, traitors and rebels and said they ought to be coerced into a submission to the decree of the convention. Mr. Davis replied that North Alabama . . . would meet them upon the line and decide the issue at the point of the bayonet." — Tenney, "Military and Naval History of the Rebellion in the United States," 9.

It was in this convention that Yancy revived the delegate theory, declaring, "All our acts are supreme, without ratification, because they are the acts of the people acting in their sovereign capacity." — History and Debates of the Convention of the People of Alabama (1861), 114.

<sup>2</sup> See McKinley, "Two New Southern Constitutions," *Political Science Quarterly*, XVIII, 507, 509, 510.

<sup>4</sup> Id. 481.

<sup>3</sup> Poore, I, 60, 76.

<sup>5</sup> Id.

<sup>6</sup> Id. 510.



*F. Virginia**1. The Preliminary Movement*

We have seen that the first recorded proposal for the submission of a state constitution to a popular vote was made in Virginia, and that its influence, though slight at the time, was felt in the later constitutional history of that commonwealth. This, however, was not the sole or even the principal source from which popular ratification finally came into Virginia. The movement which brought it about originated, significantly enough, in a portion of the Old Dominion, which had been settled largely by the sturdy stock whose constitutional achievements in the early communities of the South have already been traced.<sup>1</sup>

It has been shown how, during the eighteenth century, western Virginia was colonized by the Scotch-Irish, who were mainly Presbyterians.<sup>2</sup> In the early years of the nineteenth century this region was the scene of a new religious movement, inaugurated by two Scotch-Irishmen, Thomas Campbell and his son Alexander. One of their chief collaborators, whose field lay farther west in Kentucky, was another of the same race bearing the name of Walter Scott. From this movement has grown the great religious body known as Christians or Disciples, whose adherents now number over a million and whose centennial is about to be celebrated. Their theology represented a reaction from Calvinism, but their polity was a direct application of the Calvinistic theory, and was strikingly similar to the Puritan form. Each congregation was made supreme, and all matters were determined by the voice of the individual members. One of the straws indicating the influence of this movement upon contemporary political history is the fact that the younger Campbell, who is generally regarded by the followers of the movement as its founder, was a delegate to the constitutional convention of 1829-1830, whose proceedings we are shortly to examine, and took an active part therein.<sup>3</sup> With settlers of racial, political, and religious antecedents, distinct from those of eastern Virginia, it is not strange that the portion of the commonwealth lying west of the Alleghenies has had, from the first, an identity and history of its own. The con-

<sup>1</sup> *Ante*, Chap. VIII.    <sup>2</sup> Lewis, "History of West Virginia" (Philadelphia, 1889), 70.

<sup>3</sup> Proceedings and Debates of the Virginia State Convention, 1829-1830 (Richmond, 1830), 43.

stitution of 1776 was framed mainly with reference to eastern Virginia, and it retained many of the aristocratic features of the colonial régime. The right of suffrage, for example, was limited to freeholders, just as it had been for a century.<sup>1</sup> To the people of the western region, with their more democratic traditions and freer environment, these restrictions were exceedingly offensive. As the population increased, this dissatisfaction was augmented by the inequality of representation imposed by the old constitution under a system which the state had now outgrown.<sup>2</sup> Meanwhile, in 1792, the settlers were given an object lesson by the direct consultation of the people on the calling of a convention in Kentucky, which had just been formed out of Virginia, and the effect of this must have been considerable in stimulating the demand for a popular constitution.

As early as the second decade of the nineteenth century, therefore, a movement was inaugurated in this region for a new constitution. It was met with determined opposition by the slave-holding class, and generally by the beneficiaries of the old order, who looked with alarm upon the proposal to introduce a large element of non-freeholders into the electorate. Here also, as elsewhere, the objection of unconstitutionality was raised. The constitution of 1776 made no provision for its own displacement or amendment, and it was consequently argued that a convention, and especially a new constitution for that state, would not be lawful.<sup>3</sup> The contest lasted for more than a dozen years,<sup>4</sup> and, after many unsuccessful attempts before the legislature, that body, in 1828, passed an act,<sup>5</sup> providing as follows:—

"Whereas, it is represented to the General Assembly that a portion of the good people of this Commonwealth are desirous of amending the constitution

<sup>1</sup> Chandler, "Suffrage in Virginia," Johns Hopkins University Studies, XIX, 287. In 1677 the crown sent instructions to the Virginia governor "to take care that the members of the Assembly be elected only by freeholders as being more agreeable to the customs of England." — Lewis, "History of West Virginia," 319, 320.

<sup>2</sup> Chandler, "Representation in Virginia," Johns Hopkins University Studies, XIV, 274 *et seq.*

<sup>3</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 211. The author adds, "But the objection has commonly been urged by a minority, whose party or other interests inclined them to look with disfavor upon any change of the existing Constitution."

<sup>4</sup> For a sketch of the period see Chandler, "Representation in Virginia," Johns Hopkins University Studies, XIV, 274 *et seq.*; "Suffrage in Virginia," *id.* XIX, 287 *et seq.*

<sup>5</sup> Acts of the General Assembly of Virginia (1827–8), 18

of this state, and this Assembly feel it their duty to ascertain the wishes of the people thereon:

1. — *Be it therefore enacted*, That it shall be the duty of the several sheriffs, and other officers, authorized to conduct elections within this Commonwealth at the time and place of holding their respective elections for delegates to the General Assembly, in April next, to open a separate poll for the purpose of taking the sense of the people upon the question, whether they desire a convention or not."

But the "people" whose "sense" was thus to be taken were restricted by a subsequent clause of the act to those "qualified according to the existing laws of the commonwealth to vote for delegates to the General Assembly."

The proposal received a majority of more than 5000 in a total vote of less than 40,000,<sup>1</sup> and the following year the general assembly passed "an act to organize a convention,"<sup>2</sup> providing for the election of delegates, the framing of an amended constitution, a proclamation thereof by the governor, and a distribution of copies to the clerks of county courts. It was further enacted that it should

"be the duty of the said sheriffs, at the election aforesaid, to receive the votes of all such persons as shall by the amended Constitution, be authorized to vote for members of the most numerous branch of the Legislature, or by the said Convention, shall be authorized to vote on the ratification or rejection of the new Constitution, to be recorded in the poll-book hereinbefore required to be by them opened."<sup>3</sup>

It is evident from this that the struggle for popular ratification in Virginia had not yet terminated. The constituent act did not really settle the question of popular ratification, *i.e.* ratification by the whole people. The measure was apparently the result of a compromise between the radical and conservative elements, and merely determined that the new constitution, when framed, should be submitted to some of the people, leaving it to the convention to decide to what extent the ratification should be popular.

## 2. *The Convention*

assembled on May 5, 1829, and was, like others of that period, a notable body. Its membership included the Chief Justice of the Federal Supreme Court (Marshall), and two Ex-Presidents, Madison

<sup>1</sup> Proceedings and Debates of the Virginia Convention of 1829-1830, Preface.

<sup>2</sup> Acts of the General Assembly of Virginia (Richmond, 1829), Chap. XV.

<sup>3</sup> *Id.* sec. 19, p. 21.

and Monroe, the latter of whom was elected President of the convention. The question regarding submission does not seem to have entered prominently into its deliberations, though the debate on legislative representation and the qualifications for the franchise prepared the way for the determination of the final question as to the constituency to which the new instrument should be submitted.

On the last day of the session, John Randolph offered the following resolution: —

*“Resolved, That the amended Constitution adopted by this Convention, be submitted on the respective election days in the month of April next, to the persons qualified to vote under the existing Constitution, for members of the General Assembly.”*<sup>1</sup>

The significance of this resolution will appear when it is recalled that under the former and existing constitution none but freeholders enjoyed the franchise. On the other hand, the instrument which they had just completed, and were about to adopt, extended the right of suffrage to all white male citizens having a property qualification, measured generally by an interest in land of the value of twenty-five dollars, and also to housekeepers and heads of families.<sup>2</sup>

<sup>1</sup> Proceedings and Debates of the Virginia State Convention, 1829-1830 (Richmond, 1830), 885.

<sup>2</sup> The provision of the constitution of 1830 on this point was as follows: —

“Every white male citizen of the Commonwealth, resident therein, aged twenty-one years and upwards, being qualified to exercise the right of suffrage according to the former constitution and laws; and every such citizen, being possessed, or whose tenant for years, at will or at sufferance, is possessed, of an estate or freehold in land of the value of twenty-five dollars, and so assessed to be if any assessment thereof be required by law; and every such citizen, being possessed as tenant in common, joint tenant or partner of an interest in or share of land, and having an estate of freehold therein, such interest or share being of the value of twenty-five dollars, and so assessed to be if any assessment thereof be required by law; and every such citizen being entitled to a reversion or vested remainder in fee, expectant on an estate for life or lives, in land of the value of fifty dollars, and so assessed to be if any assessment thereof be required by law, each and every such citizen unless his title shall have come to him by descent, devise, marriage or marriage settlement, having been so possessed or entitled for six months, and every such citizen who shall own and be himself in actual occupation of a leasehold estate, with the evidence of title recorded two months before he shall offer to vote, of a term originally not less than five years, of the annual value of rent of twenty dollars, and every such citizen, who for twelve months next preceding has been a housekeeper and head of a family within the county, city or town borough or election district where he may offer to vote, and shall have been assessed with a part of the revenue of the Commonwealth within the preceding year, and actually paid the same, and no other persons, shall be qualified to vote for members of the general assembly in the county, city, town or borough, respectively, wherein such land shall lie or such housekeeper

This proposal of Mr. Randolph brought the question to a focus, and arrayed the radicals and conservatives on their respective sides of the great issue which divided them, and of which the convention was itself a product. The debates throw an interesting side-light on the existing state of political opinion regarding the suffrage, and incidentally as to popular ratification and its necessity. Mr. Randolph, in behalf of his resolution, after dwelling upon the circumstances under which the proposal to call the convention had been submitted, said: —

"Is it not plain that the freeholders had no option but to elect delegates? But that does not in the slightest degree consecrate that provision in the act, which declares to whom the Constitution shall be submitted. Sir, though it is using strong terms, it would have been an act of treachery to their own principles, to permit the Constitution to be submitted to any others than freeholders for acceptance or rejection. Is it not obvious that if the Commonwealth consists of freeholders and non-freeholders, — and the non-freeholders are, — as we have been told they are, — the most numerous of the two, — that the worst of constitutions, — and God knows I have nothing to say in favor of this one, — might have been imposed upon the Commonwealth by those who, — in the language of a gentleman of this floor, — are 'out of the Constitution' against the voice of every freeholder in the country? Sir, what sort of a tribunal do you elect, when you admit those who have no lot or part in our acts, — to pass judgment upon them? Sir, you might as well refer the Constitution to the people of Ohio, — or the people of Kentucky, — or I will go farther, — to the people of Japan. Yes, Sir, — they have just as good a right to decide upon it."<sup>1</sup>

On the other hand, Delegate Thompson, speaking for the radicals, contended: —

"That according to the theory and principles of free government and the equal rights of man, the question of ratification or rejection should be submitted to the whole community, — freeholder and non-freeholder, whether entitled or not to the right of suffrage under the constitution submitted, or the existing one.

This, he said, had been the invariable practice of every State in the Union, that had submitted an original or amended Constitution. It was the only way in which a government could regularly and rightfully be called into existence.

and head of a family shall live. And in case of two or more tenants in common, joint tenants or parceners, in possession, reversion, or remainder, having interest in lands the value whereof shall be insufficient to entitle them all to vote, they shall together have as many votes as the value of the land shall entitle them to; and the legislature shall by law provide the mode in which their vote or votes shall in such case be given." — Poore, "Charters and Constitutions," II, 1917.

<sup>1</sup> Proceedings and Debates of the Virginia Convention of 1829-1830 (Richmond, 1830), 884, 885.

It is then the act of a majority, all having been consulted, — and if a majority exclude a part from Suffrage, they have the unquestionable right to do so. From their decision there is no appeal. Then, and then only is decided rightfully the question, whether it is expedient to surrender this great natural right. Then is there less cause of complaint against its abridgment. Then the plea of expediency can be urged with plausibility and effect to sustain the decree of the majority, in which resides the rightful sovereignty in all free governments. All the gentlemen who have advocated a restricted suffrage on the floor, have founded the right to exclude upon the ground of expediency, and not that one man by nature has more right than another: but the difference between us is, that they make the minority the judges of the expediency, of retaining power in their own hands. I claim for the majority the right to decide this question. The same principles that would sanction the right of less than a majority to decide this question of expediency, would justify monarchy, oligarchy, aristocracy, despotism. If the freeholders, without consulting the non-freeholders, arrogate to themselves the exclusive right to govern this land, whether they be a majority or not, why may not a part of them with equal propriety assume that right in exclusion of the rest? Why may not the large landed proprietors deposing the petty freeholders, say, that they alone are the rightful sovereigns.”<sup>1</sup>

Delegate Johnson inquired: —

“Suppose the Constitution which they had now made should be rejected by the people, had they no government under them? Would they have no Constitution? He was sure the gentleman from Charlotte would not say so. (Mr. R. ‘That I won’t.’) How came *that* Constitution to be the supreme law of the land? Had *it* ever been submitted to the constituent body for their ratification? Had they ever voted on it at the polls? How else had the people expressed their assent to it, than by the election of Delegates under it, and by a tacit acquiescence. The authority of those who framed it was a general grant of power to provide for the exigencies of the times, — to adopt a form of government for the Commonwealth. He did not believe they had usurped any authority.”<sup>2</sup>

Delegate Nicholas declared that: —

“Every reason which could be urged, for referring the question of calling a convention to the freeholders, applies with equal force to shew that the ratification or rejection should also be submitted to them. But, it is contended that the freeholders have assented to a reference of this question to others than themselves. The law submitting the question to the freeholders, only required them to say ‘Convention’ or ‘No Convention.’ Their decision in favor of a Convention, did not waive their right to pronounce on the form of government, which might be tendered for their acceptance, nor amount to a sanction of all the provisions which might be incorporated into an act calling the Convention. Nor is the argument valid, which attempts to shew that sending delegates to the Convention implied an assent to all the provisions of the law, where those provisions

<sup>1</sup> Id. 886, 887.

<sup>2</sup> Id. 889.

exceed the power given the legislature, which was simply to call a convention. This has been satisfactorily shown by the gentleman from Charlotte (Mr. Randolph). The freeholders of one section, knowing that those in another would send deputies, were placed in a situation, where they were compelled to do the same, or suffer a constitution to be got up by one-half of the State to the exclusion of the other. And though the authority of such a Constitution might be well questioned, yet the conflict about it might have convulsed the state. The argument that the people might have remonstrated against the terms of the law, is not sufficient to shew that the Legislature did not transcend their powers in referring the subject to voters other than freeholders."<sup>1</sup>

The vote on this resolution confirmed what the newly framed instrument had already indicated, viz.: that at least the conservatives were not in control. The proposal of Mr. Randolph was rejected by a vote of more than two to one, and the new constitution was submitted to the voters at large, including those upon whom the instrument itself conferred the right of suffrage. Previous to the election, however, the General Assembly passed a statute designed to remove doubts in the construction of the enabling act and repealing certain clauses like that requiring three months' publication.<sup>2</sup> A majority of more than ten thousand in a total vote but slightly in excess of that by which the proposal to call a convention had originally passed, attested the popularity of the new instrument.

Thus originated the first popularly ratified state constitution of the South. Neighboring states had submitted proposals for conventions, and had adopted provisions requiring future constitutional changes to be submitted, but this was the first instance of a practical application of the plan south of Mason and Dixon's line. The effect upon other Southern states was profound. Commonwealths where the idea of popular ratification had never gained a foothold, or had long lain dormant, were stimulated to action by this example.

But while the convention of 1829-1830 succeeded in establishing the plan of submitting constitutions to the voters, it failed to effect the radical reforms in suffrage and representation for which the Western section stood. The agitation for these was therefore soon renewed, but it was not until 1850 that the convention met which finally gave them force.<sup>3</sup>

<sup>1</sup> Proceedings and Debates of the Virginia Convention of 1829-1830 (Richmond, 1830), 891.

<sup>2</sup> Acts of the General Assembly of Virginia (Richmond, 1830), Chap. IX.

<sup>3</sup> See an account of its labors in Chandler's "Representation in Virginia," Johns

Its work was submitted to the people and approved by an overwhelming majority.<sup>1</sup> Its disposition of the vexed question of representation was unique, and constituted a long step toward popular participation, being in effect a form of the initiative and referendum. It provided that in case the general assembly should fail to reapportion the state in 1865, and every ten years thereafter the governor should "by proclamation, require the voters . . . to declare" whether the new representation should be based on the suffrage or on taxes paid or both.<sup>2</sup> Provision was made for ascertaining the result, and communicating it to the assembly which was likewise enjoined to take action in accordance therewith.<sup>3</sup>

The work of the Richmond convention of 1861, which passed the ordinance of secession, was referred to the voters.<sup>4</sup> An instrument framed at Alexandria in 1864 was not submitted, but it was generally regarded as inoperative.<sup>5</sup> The reconstruction constitution of 1869 was submitted pursuant to an act of Congress,<sup>6</sup> but through her latest instrument just proclaimed, Virginia has returned to the eighteenth century system which required so much effort to overthrow.

In West Virginia, meanwhile, true to the traditions and aspirations of her early settlers, the first constitution, framed at the outbreak of the war, was ratified by the people as was also the instrument which displaced it a decade later.<sup>7</sup>

### G. Georgia

The first Georgia constitution was proclaimed in 1777, without an apparent suggestion of reference to the people.<sup>8</sup> Less than a

Hopkins University Studies, XIV, 314 *et seq.* It established universal white male suffrage, but its provisions as to representation were never put in force.

<sup>1</sup> "67,562 votes against over 9938 votes, several counties not having been heard from." — Poore, "Charters and Constitutions," II, 1919, note.

<sup>2</sup> Art. IV, sec. 5.

<sup>3</sup> Art. IV, sec. 6.

<sup>4</sup> Jameson, "Constitutional Conventions," 644; Poore, "Charters and Constitutions," II, 1937. The vote in Old Virginia was largely in favor; in what is now West Virginia *contra*. See Tenney, "Military and Naval History of the Rebellion in the United States," 36 *et seq.*

<sup>5</sup> Chandler, "Representation in Virginia," Johns Hopkins University Studies, XIV, 327.

<sup>6</sup> Id. 333.

<sup>7</sup> Jameson, "Constitutional Conventions," 655; Poore, "Charters and Constitutions," II, 1977, 1993. Both of these instruments expressly provide for the popular ratification of amendments and proposals for conventions.

<sup>8</sup> Stevens, "History of Georgia" (Philadelphia, 1859), II, 297, 298.



dozen years sufficed to demonstrate the need of revision, but even this was undertaken in a mode less democratic than that employed in most of the states. The legislature resolved in 1788 to appoint a commission of three from each county

"to take under their consideration the alterations and amendments that are necessary to be made in the Constitution of this State and to arrange, digest and alter the same."<sup>1</sup>

Their work was to be submitted to a second body, to be chosen this time by the people "vested with full power, and for the sole purpose of adopting and ratifying or rejecting" the same.<sup>2</sup> The first body of commissioners, however, seems to have been more inclined to democratic methods than the legislature which created it, for after meeting and agreeing upon a draft, which they signed, they ordered it printed and —

"sent by the Executive to the different counties and distributed among the justices and field officers of the militia, to be communicated to the people for their consideration."<sup>3</sup>

This was apparently an imitation of the South Carolina plan of a decade before.<sup>4</sup> The second body, instead of accepting or rejecting the draft as it was apparently designed to do, proposed certain changes, and a third set of commissioners was called to pass on these.<sup>5</sup> This body finally agreed upon an instrument which was delivered to the governor and proclaimed as the constitution of the state.<sup>6</sup>

In spite of an excellent beginning<sup>7</sup> we notice here a marked contrast with the course pursued in certain other colonies. Georgia was settled chiefly by English and non-Calvinistic stock, and there was a lack of that class of colonists whose hereditary notions probably led to a demand for popular ratification in North Carolina, and to its actual trial in Kentucky and Tennessee. It was not until after the second Virginia convention, which attracted attention throughout the South, that the practice of popular ratification came to be recognized in Georgia.

In 1832 the legislature passed an act providing for a convention<sup>8</sup> "to reduce the number of the General Assembly . . . and for other purposes." There was no precedent act for "taking the sense" of

<sup>1</sup> Stevens, "History of Georgia" (Philadelphia, 1859), II, 388.

<sup>2</sup> Id. 390.

<sup>3</sup> Id. 389.

<sup>4</sup> See *ante*, Chap. IX.

<sup>5</sup> Stevens, II, 390.

<sup>6</sup> Id. 390, 391.

<sup>7</sup> *Ante*, p. 111.

<sup>8</sup> Georgia Acts of 1832 (Milledgeville, 1838), 42.

the people, but they were called upon to choose delegates who should assemble at Milledgeville in the following year. After requiring that the governor should "give publicity to the alterations and amendments made in the constitution," etc., the act named a date which that official was required to —

"fix for the ratification by the people, of such amendments, alterations or new articles as they may make for the objects of reduction and equalization of the General Assembly only, and if ratified by a majority of the voters who vote on the question of 'Ratification' or 'No Ratification,' — then and in that event the alterations so by them made and ratified, shall be binding on the people of this state and not otherwise."<sup>1</sup>

The convention provided for by this act met and framed amendments to the constitution, which were duly submitted to the voters but rejected by them,<sup>2</sup> but five years later in much the same terms as the act of 1832<sup>3</sup> the legislature provided for another convention. This body assembled in 1839 and framed an entirely new constitution, which was referred to and ratified by the people.<sup>4</sup> Once only since then has the principle of popular ratification been ignored.<sup>5</sup> Not only the secession constitution, but the three subsequent ones, including the instrument still in force, derived their authority from a vote of the people.<sup>6</sup>

### *H. North Carolina*

We have seen how the first demand for the submission of a southern state constitution was made in North Carolina. It was almost two generations before this desire of a portion of its early inhabitants was realized, and then the realization was probably hastened by the then recent experience and example of Virginia.

In 1834 the legislature of North Carolina passed an act submitting to the people the question whether a convention should be called

<sup>1</sup> Georgia Acts of 1832, sec. 6, p. 43.

<sup>2</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 647.

<sup>3</sup> Georgia Acts of 1838 (Milledgeville, 1838), 73.

<sup>4</sup> Jameson, "Constitutional Conventions," 647.

<sup>5</sup> In the Milledgeville convention of 1861, called apparently without consulting the people, a resolution was offered providing for a popular vote on the question of secession, but was rejected by a large majority. — Tenney, "Military and Naval History of the Rebellion in the United States."

<sup>6</sup> Jameson, "Constitutional Conventions," 647.

for amending the original constitution still in force.<sup>1</sup> Besides prescribing certain propositions to be laid before the convention, the act further contained two significant provisions. It required —

“That the said Convention, after having adopted amendments to the constitution, in any or all of said particulars, shall prescribe some mode for the ratification of the same by the people or their representatives.”<sup>2</sup>

It further prescribed —

“That the convention shall provide in what manner amendments shall in the future be made to the constitution of the State.”<sup>3</sup>

The vote was favorable to the calling of a convention and that body met at Raleigh in the same year and framed certain amendments which were adopted.<sup>4</sup> The secession ordinance of this state, unlike those of Georgia and Tennessee, was not submitted to the voters.<sup>5</sup> All subsequent instruments, however, have been so referred in North Carolina, including the constitution of 1875, which is still the fundamental law of the state.<sup>6</sup> In 1900 the suffrage clause, which, in other states, had been incorporated only by proclaiming the constitution, was submitted to the voters and ratified.

### *I. Florida*

Provision for popular ratification in Florida antedates the admission of the state. As early as 1838 a convention met at St. Josephs, which has been declared “by all odds the ablest body of men ever assembled in Florida.”<sup>7</sup> It framed an instrument which contained the following: —

“This constitution shall be submitted to the people for ratification at the election for delegate on the first Monday of May next. Each qualified voter

<sup>1</sup> North Carolina Laws, 1834-1835 (Raleigh, 1835), Chap. I. The act was passed November 17, 1834.

<sup>2</sup> Id. sec. 15, p. 6.

<sup>3</sup> Id. sec. 16.

<sup>4</sup> Jameson, “Constitutional Conventions” (4th Ed., Chicago, 1887), 647.

<sup>5</sup> On January 24, 1861, a bill was passed by the legislature submitting the question of calling a convention and providing at the same time for an election of delegates. The result was a majority against the convention. Of the delegates, 82 were union and 38 secession. On April 17, the legislature, in special session, called a convention without submitting the question. On May 21 that body “enacted” a secession ordinance. Tenney, “Military and Naval History of the Rebellion,” 42, 44.

<sup>6</sup> Jameson, “Constitutional Conventions,” 647.

<sup>7</sup> Fairbanks, “History of Florida,” 201, 202.

shall express his assent or dissent to the constitution by directing the managers of said election to write opposite to his name on the poll book either the word *Constitution* or *No Constitution*." <sup>1</sup>

If Judge Jameson <sup>2</sup> is correct, however, this provision was never actually carried out. An Indian war was in progress, and when the convention met, "it was supposed," says a recent historian of the state, "that the war was about to be closed, but the continuance of hostilities prevented any effort being then made for admission to the Union, and at the close of the war in 1842 some opposition was manifested to assuming the expense of the maintenance of a State government." <sup>3</sup> But at any rate we have here a constitutional recognition of the practice nearly seven years in advance of statehood, and when Florida actually entered the Union it did so under the same constitution, <sup>4</sup> which, indeed, remained in force until the reconstruction period. The secession ordinance was not submitted, nor was the first reconstruction instrument framed in 1865. <sup>5</sup> But the latter was displaced in less than three years by another, which the people ratified, <sup>6</sup> and the present constitution was adopted in the same manner in 1886. <sup>7</sup>

### *J. Maryland*

This, we have seen, <sup>8</sup> was one of the states in which a constitution was proclaimed at the beginning of the Revolution. There were, however, some incidents in its early history which might have justified the belief that popular ratification would soon be in vogue in that state.

When, in April, 1788, the delegates chosen to consider the adoption of the Federal Constitution met at Annapolis, there was a strong majority of Federalists, and within a week the instrument was ratified by a vote of 63 to 11. <sup>9</sup> But, as in Massachusetts, New York, New

<sup>1</sup> Florida Constitution, 1838, Art. XVII, sec. 5; Poore, "Charters and Constitutions," I, 330. It provided, however, for amendment without popular ratification. Id. 328, Art. XIV.

<sup>2</sup> "Constitutional Conventions" (4th Ed., Chicago, 1887), 653.

<sup>3</sup> Fairbanks, "History of Florida," 202.

<sup>4</sup> Poore, I, 331.

<sup>5</sup> Id. 332.

<sup>6</sup> Id. 347.

<sup>7</sup> Jameson, "Constitutional Conventions," 653. Cf. Fairbanks, "History of Florida," 230.

<sup>8</sup> *Ante*, 137.

<sup>9</sup> See Steiner, "Maryland's Adoption of the Federal Constitution," *American Historical Review*, V, 211.

Hampshire, Rhode Island, and other states, there was a considerable element which regarded the Federal Constitution as defective and objectionable in certain particulars, though some of these believed that practical considerations required its adoption. Among those who insisted that the instrument should be amended was William Paca, one of the leaders of the Anti-Federalists in this convention. Before the vote to ratify was taken he had prepared and attempted to offer a list of proposed amendments,<sup>1</sup> mostly of the character of a Bill of Rights, which the original constitution lacked. Immediately after the ratifying vote had been taken Paca renewed his proposal and, after some debate, it was —

"Resolved, That a committee be appointed to take into consideration and report to this house on Monday morning next, a draught of such amendments and alterations, as may be thought necessary in the proposed Constitution for the United States, to be recommended to the consideration of the people of this State, if approved of by this Convention."<sup>2</sup>

The committee was appointed and the amendments considered, but none of them was ever submitted as a majority of the delegates appear to have concluded, on second thought, that this course would weaken the effect of ratification.

The plan here indicated may have been suggested by the course followed in South Carolina, with reference to the second constitution of that state.<sup>3</sup> There was not, it is true, any specific indication as to how the people were to express the results of such a "consideration," but it was something to recognize that the consideration was proper and necessary.

Another early indication of democratic tendencies in Maryland is found in the extension of the franchise. In 1810, a full generation before the movement for universal suffrage had been consummated elsewhere, Maryland adopted an amendment, conferring the franchise upon all free, white, male citizens of one year's residence.<sup>4</sup> This result, it will be remembered, was not accomplished in Virginia until forty years later, and then only after a prolonged and bitter contest.

<sup>1</sup> See Steiner, "Maryland's Adoption of the Federal Constitution," *American Historical Review*, V, 223, 224, where the text of these is printed.

<sup>2</sup> Id. 212, 213.

<sup>3</sup> *Ante*, Chap. IX.

<sup>4</sup> Poore, "Charters and Constitutions," I, 832. "The state of Maryland, which had been founded by men of rank, was first to proclaim universal suffrage and to introduce the most democratic forms into the whole of its government." — De Tocqueville, "Democracy in America" (6th Ed., Boston, 1876), I, 71.

But notwithstanding these early indications, and although Maryland is situated on the border of the sections between two states which had adopted the system of popular ratification comparatively early, it was nevertheless the last state in the South to submit its constitution to a popular vote prior to the Civil War. Among the causes for this was the agitation of the slavery question, which made the slaveholding class timid in regard to political changes of any sort. But a more effective obstacle was found in the existing constitution. This instrument, framed in 1776, provided for its own amendment through an act of two successive legislatures,<sup>1</sup> and also —

“that this Declaration of Rights, or the Form of Government to be established by this Convention, or any part or either of them ought not to be altered, changed or abolished by the Legislature of this State, but in such manner as this Convention shall prescribe and direct.”<sup>2</sup>

This, it will be seen, presented a more serious question than had arisen in Virginia, where the original constitution had merely failed to provide any method of amendment or change.<sup>3</sup> Standing on this declaration, the conservative element, including generally the agricultural and slaveholding interests, resisted all attempts to call a new convention, and denied the legality of such a course.<sup>4</sup> “The conventional reformers,” on the other hand, who were generally supported by the commercial classes, relied on the inherent power of the people to change their constitution. “We hold,” they declared in a statement published<sup>5</sup> in the later years of the struggle:—

“that the 59th article of the constitution is not, and was not intended to be other than a restriction upon the legislature; and that the people cannot be curtailed of their sovereignty by constitutional provisions nor by legislative enactments.”

Influenced, no doubt, by the success of the constitutional reformers in the neighboring states of Virginia in 1829 and Pennsylvania in 1835, and with much the same purpose in view, a movement was inaugurated in Maryland in the last-named year which resulted in the assembling of a delegate convention at Baltimore in June, 1836. Besides urging the electors to vote for no legislative candidates who would not favor a reference to the people of the question of calling

<sup>1</sup> Art. LIX.

<sup>2</sup> Declaration of Rights, sec. 42.

<sup>3</sup> *Ante*, 218.

<sup>4</sup> See Harry, “The Maryland Constitution of 1851,” *Johns Hopkins University Studies*, XX, 387 *et seq.* This position of the opponents of conventional reform seems to be indorsed by Jameson in his “Constitutional Conventions” (4th Ed., Chicago, 1887), sec. 225.

<sup>5</sup> *Baltimore Sun*, September 8, 1849.

a constitutional convention, this body requested its president, in case the ensuing legislature should fail to submit the question

"forthwith to convene this convention for the adoption of such ulterior [*sic*] measures as may then be deemed expedient, just and proper, as may be best calculated, without the aid of the Legislature to ensure the accomplishment of the desired results."<sup>1</sup>

This movement did not then bring about the desired referendum, but it did, in connection with the course pursued by the opposition, result in some notable changes in the constitution by way of legislative amendment. For sixty years the Maryland senate had been chosen by a college of electors, consisting of two from each county, elected by the people.<sup>2</sup> This had also furnished the model to the Federal constitutional convention for its plan of electing the president.<sup>3</sup> But as early as 1807, an attempt had been made to substitute a direct election of senators by the people,<sup>4</sup> and in order to prevent a convention referendum, the opposition electors now refused to meet with the others and choose a Senate.<sup>5</sup> The result was the passage of an amendment, which was ratified by the succeeding legislature, abolishing the electoral college, providing for a popularly chosen Senate,<sup>6</sup> and equalizing the legislative representation by increasing that of the more populous counties.<sup>7</sup> These and other changes tended to allay for a time the agitation for a convention, but it was soon revived by the increasing prominence of the slavery question, and the burdensome conditions of the state's finances resulting from heavy appropriations for internal improvements. In 1845 another convention of constitutional reformers met at Baltimore and besides passing resolutions, not unlike those of 1836, perfected a per-

<sup>1</sup> Scharf, "History of Maryland" (Baltimore, 1879), III, 189.

<sup>2</sup> Maryland Constitution of 1776, Art. XIV.

<sup>3</sup> "To Maryland undoubtedly belongs the honor of furnishing to the Fathers the basis of our Electoral system and its essential features are found in her constitution of 1776, the virtues of its methods having been openly canvassed in the Federal convention July 3, 1787." — McKnight, "The Electoral System" (1878), 221. Cf. the remarks of Mr. Bowdoin in the Massachusetts Convention of 1788, called to ratify the Federal Constitution. See Elliott's "Debates," II, 127, 128.

<sup>4</sup> Scharf, "History of Maryland" (Baltimore, 1879), III, 188; McSherry, "History of Maryland" (Baltimore, 1849), 348.

<sup>5</sup> McSherry, 349 *et seq.*; Steiner, "The Electoral College," Report of American Historical Association (1895), 142.

<sup>6</sup> Poore, "Charters and Constitutions" (Washington, 1877), II, 832 *et seq.*

<sup>7</sup> *Id.* 833, 834.

manent organization of the movement.<sup>1</sup> The referendum demand was pressed upon the legislature at the ensuing session, but the majority report of the committee to which the bill for that purpose had been referred, reiterated the claim of unconstitutionality for such a measure, and in the house the vote was a tie.<sup>2</sup>

But although it rejected the leading demand of the reformers, this legislature materially, and doubtless too, unintentionally, promoted their movement by referring to the people, in form at least, a proposed amendment providing for biennial legislative sessions.<sup>3</sup> The proposal was approved by the voters,<sup>4</sup> and in this instance we have the first appearance of the practice of popular ratification in Maryland. Though originally proposed nearly sixty years before, and long and consistently demanded by a considerable element of the people, the application of this democratic principle in constitution-making was deferred in Maryland until almost the middle of the nineteenth century.

In the campaign of 1847, the advocates of a convention renewed their efforts with the result that the governor chosen that year was favorable to the plan. The legislature, however, which was again strongly Whig, rejected the measure, and its supporters were relegated to another appeal to the people. By this time the convention proposal had become the burning question in Maryland politics. Coupled with it were demands for a more equal representation in the Senate, changes in the tenure, and selection of the judiciary and limitations on public expenditures. Meetings and conventions to promote the movement were held in various parts of Maryland, and

<sup>1</sup> Niles' Register, LXVIII (XVIII, 5th ser.), 405.

<sup>2</sup> Maryland House Journal, 1845, Dec. Sess.

<sup>3</sup> The amendment was really adopted in the same manner as previous ones by the legislature; but the act as originally passed contained a clause requiring the judges of election to "inquire of each voter as he casts his ballot whether he is for or against the provisions of this bill," and to make a return of the votes thus cast. Maryland Laws, 1845-1846, Chap. 269, sec. 7. There was nothing in the act, however, making the adoption of the amendment dependent on the result of this vote, though the act did recite that "it is to be desired that the next legislature, may know whether so important an alteration in the constitution and form of government of this state . . . is in accordance with the will of the people." *Id.* sec. 6.

<sup>4</sup> Poore, I, 837. "The referendum was held on the general election day in 1846. Each voter was asked by the judges of the election whether he was in favor of biennial or annual sessions. Biennial sessions were declared for by a majority of some five thousand voters." — Harry, "The Maryland Constitution of 1851," Johns Hopkins University Studies, XX, 428.



another state convention met at Baltimore in July, 1849, which devoted two days to formulating plans of campaign, and adopted a resolution declaring —

"that all minor questions, whether of Federal or State policy should be omitted, to attain for the people the great blessings of reform of their constitution, which they alone are competent to make, most beneficially to themselves, by the means of a convention, which shall be composed of delegates directly elected by, and immediately responsible to, the people of this State."<sup>1</sup>

In the campaign that followed, the Democrats generally advocated a convention; while many Whigs favored it, the opposition came from that party especially on the Eastern shore and in the southern counties. When the election of 1849 was held, it was found that the Whigs had a majority in both houses of the legislature, but owing to the divided sentiment of that party, the fate of the convention project was still in doubt. Upon the assembling of the legislature, a special committee was chosen by the House to consider the submission of a convention proposal, and to prepare a measure accordingly. In January, 1850, two reports were presented, one favoring a convention and accompanied by a bill for that purpose; the other adhering to the position that such a plan was illegal, and recommending first a repeal of the controverted clauses in the old constitution. The conservatives no longer opposed a convention *in toto*; the most they could now hope for was delay, and they contented themselves with urging a different method from that of their adversaries. The struggle between the advocates of the respective plans was intense, and seems to have been terminated in favor of submission only when it was plainly seen that a majority of the electors were determined to secure a convention whether authorized by the legislature or not.<sup>2</sup> Both houses of the legislature, by a close vote, finally passed the committee bill, submitting to the people the question of calling a convention and providing further: —

"That the constitution reported and adopted by the convention assembled as aforesaid shall, on the first Wednesday of June, eighteen hundred and fifty-one, be submitted to the legal and qualified voters of this state, for their adoption or rejection."<sup>3</sup>

<sup>1</sup> *Baltimore American*, July 27, 1849, quoted by Harry, "The Maryland Constitution of 1851," *Johns Hopkins University Studies*, XX, 405.

<sup>2</sup> See an editorial in the *Baltimore Sun*, May 7, 1850.

<sup>3</sup> *Maryland Laws*, 1850, Chap. 405.

The campaign was now again transferred to the people. The advocates of the amendment made an organized effort in its behalf, and took no chances on popular indifference.<sup>1</sup> The result, however, showed that this was unnecessary. At the election in May, 1850, out of 28,358 votes cast, 23,423, or nearly six-sevenths, were in favor of a convention.<sup>2</sup> Thus did the Maryland electorate express itself with no uncertain voice, when the long deferred opportunity was given. Delegates were elected on September 4, 1850, and two months later the convention met at Annapolis. With the details of its proceedings we are not here so directly concerned.

"The great battle, in fact, was fought and won when the legislature after a steady resistance of twenty years, finally promulgated, and Maryland by an almost unanimous vote ratified, the doctrine that the people are not enchained by the fifty-ninth article of the constitution."<sup>3</sup>

Speaking generally, this convention may be said to have performed the work of democratizing the constitution, which in other states had been accomplished nearly a generation before. The constitution framed by it broadened the religious qualification for holding office,<sup>4</sup> practically abolished the extensive appointing powers of the governor, and made most officers elective,<sup>5</sup> including all judges,<sup>6</sup> reduced the terms and salaries of appellate court judges,<sup>7</sup> based representation in the House of Delegates on population,<sup>8</sup> reduced the terms of senators from six to four years,<sup>9</sup> abolished imprisonment for debt,<sup>10</sup> provided an exemption from execution of property to the amount of five hundred dollars,<sup>11</sup> and limited the rate of interest to six per cent.<sup>12</sup>

In reference to future constitutional changes, however, the convention witnessed the renewal, on a small scale, of the long struggle between advocates and opponents of popular ratification. The report of the chairman of the committee on future amendments and revision,

<sup>1</sup> Harry, "The Maryland Constitution of 1851," Johns Hopkins University Studies XX, 409, 410.

<sup>2</sup> Id. 409, 410, 463.

<sup>3</sup> Governor Lowe in his inaugural address, 1851; Debates of the Maryland Convention of 1851, II, 96.

<sup>4</sup> Constitution of 1851, Declaration of Rights, sec. 34. This clause required only a declaration of belief in a future state of rewards and punishments, instead of in the Christian religion, as did the Declaration of Rights of 1776, Art. XXXV.

<sup>5</sup> Art. II, sec. 11.

<sup>6</sup> Art. III, sec. 3.

<sup>11</sup> Art. III, sec. 39.

<sup>8</sup> Art. IV.

<sup>9</sup> Art. III, sec. 6.

<sup>12</sup> Art. III, sec. 49.

<sup>7</sup> Art. IV, sec. 4.

<sup>10</sup> Art. III, sec. 44.

virtually recommended the retention of the old system of amendment by the legislature, for while it provided for a convention, this was to be called by the legislature if its action should be ratified by a succeeding one.<sup>1</sup> As against this report, which was not signed by a majority of the committee, another member, with the concurrence of four colleagues, recommended on the following day the plan of periodical resubmission to the people, every ten years, of the proposal to call a convention.<sup>2</sup> In the debates on this question, it developed that the first report was offered in the interest of the slaveholders. Its author and advocate "was not willing to trust the maintenance of slavery under a constitutional provision which would enable the majority of the voters to call a convention."<sup>3</sup> Always quick to scent alarm, the defenders of the slave power saw its doom in a constitution which should spring solely from the sovereign people.

An attempt was made to amend the second report by requiring the governor, without action by the legislature, to submit the convention proposal every ten years.<sup>4</sup> But this was too radical a departure from previous usage, and the second report was adopted, changed only by requiring the submission to take place after each Federal census.

The instrument finally framed by this convention went to the electors on June 4, 1851, after a brief canvass of twenty-two days. It encountered much bitter opposition,<sup>5</sup> and might have been rejected<sup>6</sup> had not that result involved also the principle of popular ratification of which this instrument was at once the embodiment and the outgrowth. The attitude of the people of Maryland toward this great doctrine, which the constitution of 1851 so firmly anchored, was well expressed by Governor Lowe in his inaugural message of that year, when he said of it: —

"This is the entering wedge to the future. This is the key to the treasury of popular rights. With this weapon the people will be resistless in all future struggles for the extension of their privileges."<sup>7</sup>

<sup>1</sup> Debates of the Maryland Convention of 1851, II, 223.      <sup>2</sup> *Id.* 245.

<sup>3</sup> Harry, "The Maryland Constitution of 1851," Johns Hopkins University Studies, XX, 436; Debates of the Convention, II, 364. Cf. I, 153.

<sup>4</sup> Debates of the Convention, II, 360.

<sup>5</sup> "The failure to provide for a uniform system of public schools," caused much dissatisfaction. — Harry, "The Maryland Constitution," Johns Hopkins University Studies, XX, 443.

<sup>6</sup> *Id.* 449.

<sup>7</sup> Debates of the Maryland Convention of 1851, II, 96.

In such a spirit as this the electorate of Maryland ratified its first popular constitution. The verdict was not so pronounced <sup>1</sup> as in the vote on the convention proposal, but, in view of the conceded deficiencies of the instrument, this was a clear declaration of what proved to be true, — that popular ratification was now a permanent part of the public law of Maryland. Three years later the state's highest court said of this instrument: —

It, unlike the acts of our legislature, "*owes its whole force and authority to its ratification by the people.*"<sup>2</sup>

And although the legislature failed to perform its duty of resubmission until four years after the ensuing Federal census,<sup>3</sup> the result then was the calling of a convention and the framing of a new and more satisfactory constitution, which was referred to and ratified by the people even in the midst of a civil war, of which their state was too frequently the scene.<sup>4</sup>

This instrument not only contained a requirement of its own submission but provided for amendment by a majority of those voting thereon, and adopted the New Hampshire idea of periodical consultation of the people, making the period every twenty years.<sup>5</sup>

Three years later the voters acted again, and another constitution was put in force,<sup>6</sup> to remain for many years, and no attempt seems ever to have been made to return to the system of constitution-making without the direct participation of the people. Even the movement to restrict the suffrage, in which Maryland attempted to follow the lead of her Southern neighbors, was promoted by submitting constitutional amendments instead of through what Dr. Borgeaud terms <sup>7</sup> the *coup d'état* of Mississippi.

Thus the system of popular ratification became general throughout the South. At the outbreak of the war there was no Southern

<sup>1</sup> "The vote was 29,025 in favor and 18,616 against, giving a majority of 10,409." — Harry, "The Maryland Constitution of 1851," Johns Hopkins University Studies, XX, 446, 464.

<sup>2</sup> *Manley v. State*, 7 Md. 135, 136, 147.

<sup>3</sup> Maryland Laws, 1864, Chap. V.

<sup>4</sup> See Myers, "The Maryland Constitution of 1864," Johns Hopkins University Studies, XIX, 353 *et seq.*

<sup>5</sup> Art. XI, Poore, "Charters and Constitutions," I, 884, 885.

<sup>6</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), 646.

<sup>7</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 174, note.

state which had not in some way recognized popular ratification in its public law, though South Carolina had never repeated its early approach to the plan. Even ordinances of secession were, as we have seen, submitted in the states of Tennessee, Texas, and Virginia. Of the others a distinguished Northern judge declared: —

“In our day, conventions, imputing sovereignty to themselves, have ordained secession, dragged states into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien state governments and a Southern Confederacy.”<sup>1</sup>

<sup>1</sup> Wood's Appeal, 75 Pa. St. 74.

## CHAPTER XV

### POPULAR RATIFICATION IN THE MIDDLE STATES

#### *A. Pennsylvania*

POPULAR ratification was, as has been shown, recognized in the public law of Pennsylvania during the revolutionary period. Indeed, before the close of the eighteenth century the plan had been actually applied in a way, and to the Keystone Commonwealth belongs the honor of having been the pioneer in this movement among the middle states.

In 1789 the assembly passed resolutions expressing its approval of the plan of calling a convention, and further providing:—

“That on the pleasure of the people in the premises being signified to them at their next sitting, they would provide by law for the expenses of the Convention, and, if requested, would appoint the time and place for the meeting thereof.”<sup>1</sup>

This time the “pleasure of the people” seems to have been learned through the medium of petitions and reports by members of the assembly, and a convention was at last called which entered upon its work in Philadelphia in November, 1789. This body, after a session of about three months, framed a new constitution, and adjourned on February 26, 1790, “that the people might examine it.”<sup>2</sup> Copies of the new instrument to the number of 3500 in English and 1500 in German were printed and distributed,<sup>3</sup> but no formal steps appear to have been taken to ascertain the popular will by vote.<sup>4</sup>

The constitution thus adopted remained in force for almost a half century, but it contained no provision for its own amendment, and as time passed and conditions changed, this was found to be a serious defect. Influenced, no doubt, also by the example of numerous other

<sup>1</sup> Jameson, “Constitutional Conventions,” sec. 222.

<sup>2</sup> Id. 646.

<sup>3</sup> Borgeaud, “Adoption and Amendment of Constitutions,” 170, note.

<sup>4</sup> Jameson, “Constitutional Conventions,” 646.

states which were adopting or changing constitutions about this period, the legislature, in 1835, submitted the question of calling a convention with

"authority to submit amendments of the State Constitution to a vote of the people for their ratification or rejection, and with no other or greater powers whatsoever." <sup>1</sup>

The language of this act is significant. It shows that by this time the theory that sovereignty resides in the convention had been thoroughly repudiated in Pennsylvania, and that the legislature was not content merely to provide for empowering the convention to submit amendments, but desired to forestall any attempt to proclaim them. As the result of the poll was favorable to a convention, an act was passed the following year providing for its convocation and prescribing requirements for submitting the results of its work to the electors,<sup>2</sup> and the convention accordingly met at Harrisburg in 1837.<sup>3</sup>

As the necessity for providing a satisfactory method of amendment was one of the main causes which led to the convention, it was natural that much of the delegates' attention should be devoted to that subject. Maine, as we have seen, had dispensed with the double legislative authorization, but it still required a majority of two-thirds to submit. The method finally evolved in Pennsylvania differed from any theretofore adopted in authorizing the submission of amendments by a majority vote only, though still requiring the approval of two successive legislatures.<sup>4</sup> This plan was not agreed to in the convention without considerable debate.<sup>5</sup>

There was the usual division among the delegates into radical and conservative groups, the former urging the convention to trust the people, and the latter pointing out the danger of hasty and ill-advised changes. One interesting feature of the discussion was a proposal,<sup>6</sup> coming curiously enough from the conservatives, making a petition from five per cent of the voters a prerequisite to legislative action upon amendments. Pennsylvania had, as we have seen, in her first constitution, practically adopted the referendum. This time the commonwealth came near having the initiative. The proposal

<sup>1</sup> Pennsylvania Laws, 1834-1835, 270.

<sup>2</sup> Id. 214.

<sup>3</sup> See its Journal (Harrisburg, 1837).

<sup>4</sup> Pennsylvania Constitution, 1838, Art. X; Poore, "Charters and Constitutions," II, 1565, 1566.

<sup>5</sup> Proceedings and Debates of the Convention, XII, 84, 102, 225, 242-262.

<sup>6</sup> Id. 58, 84.

was finally defeated, but the plan agreed upon was a compromise, submission being authorized but once in five years.<sup>1</sup> This may account for the narrow majority<sup>2</sup> which the revision<sup>3</sup> received, though the article was retained *in toto*<sup>4</sup> in the constitution of 1873, which was framed by a convention likewise meeting at Harrisburg, and whose work was approved by a popular majority of more than two to one.<sup>5</sup> It was this convention which attempted to enact an ordinance providing for the appointment of officers for the election at which the instrument should be submitted, and this action called forth two vigorous opinions<sup>6</sup> from the Supreme Court defining the powers of such a convention, denying it the slightest legislative capacity, and sweeping away the last vestige in that state of the delegate theory in constitution-making.

### B. New York

Nowhere is the truth better illustrated that the spread of the method of popular ratification paralleled the movement for the democratization of the government than in the history of the second constitution of New York. For nearly a half century the people of that state had lived under a constitution, framed in the early years of the Revolutionary War, which retained many of the aristocratic features of the old régime. As was well remarked by a member<sup>7</sup> of the convention of 1821, "the framers of the constitution of 1777 borrowed freely from that government whose chains they had recently broken." One of these features was the council of revision, consisting of the governor, chancellor, and judges of the Supreme Court, to which all bills passed by the legislature were required to be submitted, and upon which was conferred the veto power, subject to being overruled only by a two-thirds vote of the legislature.<sup>8</sup> Another was the suffrage clause requiring a voter to have been for six

<sup>1</sup> Art. X; Poore, "Charters and Constitutions," II, 1366.

<sup>2</sup> The vote was 113,971 to 112,759.

<sup>3</sup> The amendments, together with the old constitution, were printed and circulated.

<sup>4</sup> Art. XVIII. See Poore, "Charters and Constitutions," II, 1590.

<sup>5</sup> The vote was 293,564 to 109,198.

<sup>6</sup> *Wells v. Bain*, 75 Pa. St. 39; *Wood's Appeal*, 75 Pa. St. 59.

<sup>7</sup> Mr. Wheeler, representing Washington and Warren counties. See *Proceedings and Debates of the New York Constitutional Convention of 1821*, 117.

<sup>8</sup> New York Constitution of 1777, Art. III; Poore, "Charters and Constitutions," II, 1332.



months "a freeholder, possessing a freehold of the value of twenty pounds within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this State."<sup>1</sup> Still another was the council of appointment, consisting of a committee of senators chosen by the assembly, to which was committed the appointment of practically all of the local and county officers.<sup>2</sup> Provisions like these became more and more irksome to the New Yorkers as the growing spirit of democracy permeated the state, and as they saw other states around them adopting constitutions more in accordance with the popular sentiment of the day. By the close of the second decade of the nineteenth century there was a loud demand for a change. The existing constitution did not provide for its own amendment in any form and a constitutional convention seemed to be the only practical method of reform. One of the delegates in the convention of 1821, describing the situation, is thus reported:<sup>3</sup>—

"Defects in the constitution, which experience had shown, had induced the people to call for a convention,— they had defined these defects. In the November session of the legislature, 1820, public opinion had been called in question as it regarded their wish for a convention. He recollected that soon after the people in almost every county of the state assembled expressly for the purpose of manifesting their sentiments on the subject,— resolutions were passed defining the rotten parts of the constitution. You have heard the call for the extension of the elective franchise, for the abolition of the council of appointment and the alteration of the council of revision."

### 1. *The Preliminary Movement*

In 1819, Governor Clinton, in his message to the legislature, called attention to this popular demand, but the remedy suggested was limited to a convention. No submission to the people was recommended, and no need of a popular ratification recognized. The statesmen of New York were still apparently under the spell of the older practice.

The following year, however, witnessed the assembling of the second constitutional convention of Massachusetts, whose labors we have already reviewed. Its deliberations attracted attention generally throughout the country,<sup>4</sup> and particularly in the adjoining state of New York, whose constitution of the ensuing year bears frequent

<sup>1</sup> New York Constitution of 1777, Art. VII; Poore, II, 1334.

<sup>2</sup> Id. Art. XXIII, 1336. <sup>3</sup> Mr. Nelson. See Proceedings and Debates, 177.

<sup>4</sup> Borgeaud, "Adoption and Amendment of Constitutions," 149.

evidence of the influence of the Massachusetts instrument. Among others Governor Clinton seems to have watched the proceedings of the Boston convention, and to have been impressed with the plan of popular ratification, which it, like its predecessors in Massachusetts, had applied. For, when the New York legislature convened again in November, 1820, the governor sent a message containing this significant recommendation:—

"In 1801, the legislature submitted two specific points to a convention of delegates chosen by the people, which met and agreed to certain amendments. Attempts have been made at various times to follow up this precedent, which have been unsuccessful, not only on account of a collision of opinion about the general policy of the measure, but also respecting the objects to be proposed to the convention. These difficulties may be probably surmounted either by submitting the subject of amendments generally to a convention, and thereby avoiding controversy about the purposes for which it is called, or by submitting the question to the people in the first instance to determine whether one ought to be convened; and, in either case, to provide for the ratification by the people in their primary assemblies of the proceedings of the convention."<sup>1</sup>

But the legislature was more intent upon removing the objectionable features of the old constitution than of adopting any prescribed method of constitution-making. It therefore passed a bill providing for a convention to meet in the following June, but omitting all provision for the popular initiative, and while it required popular ratification, this requirement was coupled with movement for an extension of the franchise by providing for submission to "all the free male citizens of the state twenty-one years of age and over."<sup>2</sup> This bill, like all others, went to the council of revision, which was then composed of Governor Clinton, Chancellor Kent, Chief Justice Spencer, and Justices Waite, Woodworth, Van Ness, and Platt. The two last named did not participate in the consideration of the bill, while the three first named concurred in the following objections, prepared by Chancellor Kent, the two Supreme Court justices dissenting:<sup>3</sup>—

"1.— Because the bill recommends to the citizens of this state, to choose by ballot, on the second Tuesday of February next, delegates to meet in Convention, for the purpose of making such alterations in the constitution of this state, as they may deem proper, without having first taken the sense of the people

<sup>1</sup> Journal of the New York Assembly, 44th Sess., 11.

<sup>2</sup> Journal of the New York Senate, 44th Sess., 48-50.

<sup>3</sup> Proceedings and Debates of the New York Constitutional Convention of 1821, Appendix, 677 *et seq.*

proposal even more democratic than  
avoid."

It may be that the majority of  
favorable to a movement which there  
is hardly consistent with the great  
that he presented these arguments in  
fuge to prevent the calling of a convention  
in the assembly was not convinced of  
chancellor, and a committee was appointed  
were referred. The report of this committee  
sage of the bill over the veto and passed  
to the council's objections, in which it  
the convention practice in other states

"It will be seen, that none of the constitutions  
the people require any subsequent reference,  
Hampshire; nor is any other instance to be  
reference of the amendments, that the prior approval  
seem to be a constitutional principle, to be decided  
at some stage of an undertaking to amend a constitution  
to the people; but whether that be prior, or  
not material, especially in those cases where  
the legislature, but by delegates of the people  
and, indeed, the latter method (a question to be  
upon the final ratification of the amendments) is  
the best safeguard to life and liberty."

successful, for the supporters of the bill in the legislature were unable to muster the necessary two-thirds to secure its passage over the veto. A new measure was accordingly prepared which was, in effect, a compromise or at least a concession to the opponents of the first. The new bill provided for submitting the question of calling the convention, and also that in case the plebiscite should result in favor of such a course

"it shall and may be lawful, and it is hereby recommended to the citizens of this state, on the third Tuesday of June next, to elect by ballot, delegates to meet in convention, for the purpose of considering the constitution of this state, and making such alterations in the same as they may deem proper; and to provide the manner of making future amendments thereto."<sup>1</sup>

The electorate, to which all these questions were to be submitted, was to include<sup>2</sup>

"all free male citizens of this state, of the age of twenty-one years or upward, who shall possess a freehold within this state, or who shall have been actually rated, and paid taxes to this state, or who shall have been actually enrolled in the militia of this state, or in a legal volunteer or uniform corps, and shall have served therein, either as an officer or private; or who shall have been assessed to work on the public roads and highways and shall have worked thereon, or shall have paid a commutation therefor, according to law."

Finally the act contained the requirement, new to the public law of New York:—

"That it shall be the duty of the said convention, to submit their proposed amendments to the decision of the citizens of this state, entitled to vote under this act, together or in distinct propositions, as to them shall seem expedient. . . . And the proposition of such convention which shall be approved by a majority of the vote at such election, shall be deemed and taken to be a part of the constitution of this state; and that the proposition which shall not be so approved, shall be considered void and of none effect."<sup>3</sup>

## 2. *The Convention and its Work*

The result of the plebiscitum was a pronounced majority in favor of the convention, and at the appointed time, elections were accordingly held and delegates chosen, who met at the state capital on

<sup>1</sup> Act of March 13, 1821, sec. V. See Proceedings and Debates of the New York Constitutional Convention of 1821, p. 22.

<sup>2</sup> Act of March 13, 1821, sec. I.

<sup>3</sup> Id. sec. IX. See Proceedings and Debates of the New York Constitutional Convention of 1821, p. 22.

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28, 1821. There were many among them whose fame then was far more than state-wide; such as Chancellor Kent, Justice Spencer, Martin Van Buren, destined before many be Chief Magistrate of the nation, Daniel D. Tompkins, Root, and many others. The contest for popular ratification of the new constitution itself, having been fought out in the legislature at the polls, that subject was, of course, not directly before the convention. But the lines were drawn anew on the question of amendments and the debates thereon are instructive as reflecting the attitude of the statesmen of that day toward the direct participation of the people in the making of laws.

Early in the session the committee on future amendments recommended the following provision on that subject: <sup>1</sup> —

And be it further ordained, &c. that if, at any time hereafter, any specific amendment or amendments to the constitution shall be proposed in the Senate or Assembly, and agreed to by two-thirds of the members elected to each of the said bodies, such proposed amendment or amendments, shall be entered on their respective journals with the yeas and nays taken thereon, and referred to the legislature next to be chosen, and shall be published for six months previous to the time of such choice, and if, in the legislature next chosen as aforesaid such amendment or amendments shall be agreed to by two-thirds of the

as often as the advertisements of mortgage sales, which might occupy the contiguous columns. There was no necessity of presenting the subject twice to the legislature.

"Mr. Van Vechten, as a member of the committee which had presented the report, thought it expedient to state a brief outline of the reasons that had induced the committee to offer it. The principle of the report was borrowed from the amendment to the constitution of Massachusetts. The object of requiring its passage by two-thirds of two successive legislatures was, that the attention of the people might be called to the subject, and sufficient time given for deliberation upon it; and it is probable that the members of the second legislature would be chosen with special reference to the subject. The constitution, he said, should not be altered for light and trivial causes. Its amendment should be the result of calm and dispassionate reflection, not of sudden and strong excitement.

"Mr. Sharpe was opposed to striking out. After the constitution should be made, he hoped it would be united in by the convention and the people, and suffered to remain long enough to give it a fair experiment. Sir, in this way, we shall be making amendments too cheap. The legislature will always be troubled with propositions from various parts of the state, to alter the constitution and these from one place or another will be received year after year. Experience will warrant this conclusion, from what has taken place in regard to the constitution of the United States. Sir, a session of congress never passes in which much time is not occupied in discussing amendments to that constitution.

"Gen. Root. It seems that such perfection will be obtained in the instrument about to be made, as never to require amendment. It is to be the very essence of perfection, and will remain forever unalterable. We have been told that we must make a constitution for future ages, when this state shall become populous and corrupt. In that case, it ought to be so made as to be capable of alteration, so as to check the first appearance of corruption. It will undoubtedly require alteration, as the condition of society may change. If the people foresee that the constitution we present to them is susceptible of amendment they may adopt it, even though some of its provisions may be obnoxious. But if an insuperable barrier is placed in the way of alterations, its adoption may be very doubtful. The Constitution of the United States would never have been ratified, had it not been capable of amendment.

"It had been said, that the second legislature will bring with them the sentiments of the people on the subject. If so, where is the benefit of referring it to the people at all? He thought the constitution of the United States had not been sufficiently liberal on this subject, and that many salutary amendments had been prevented. In this convention a bare majority is expected to make such a perfect constitution that the unhallowed hands of posterity must never pollute it with their touch. He was unwilling that the motto *Noli me tangere* should be inscribed upon it.

"Chief Justice Spencer said, when he read this report he did think that we should unanimously adopt it without amendment, and that we should have the satisfaction of agreeing upon one point at least. But he now despaired of realizing

his hopes and expectations. The amendment of the gentleman from Delaware appeared to him to be a mischievous one, though he did not charge him with that intention. He explained the provisions of the report, and thought they were such as every member must approve. It afforded him pleasure to see incorporated in this report one principle which he had mentioned in a former debate, — he meant the principle of submitting the question to the people in the first instance, whether they would amend the constitution. The gentleman from Delaware had complained that there would be great delay in effecting any amendment. Mr. S. did not apprehend any difficulty on this score. He hoped the constitution would not be left so imperfect, that the postponement of an amendment for two years at farthest, would be a serious grievance.

"Gen. Tallmadge concurred in the remarks that had fallen from the Honorable Gentleman from Albany (Mr. Spencer), and had hoped that this report would have been unanimously adopted. If the motion of the gentleman from Delaware should prevail, it would result that the vital principles of the government might be entirely changed and its most important and valuable institutions overturned, in the short period of six or seven months. It necessarily devolved upon the legislature to fix the time when it should be submitted for final ratification by the people: and thus essential and momentous principles might be introduced under the impulse of sudden excitement. Three-fourths of the states, instead of two-thirds, are required to sanction amendments to the constitution of the United States; and the time necessarily required to obtain that sanction, was very considerable. But even there, it had been shown from experience, that amendments were liable to be obtained with too great facility."

The report was finally adopted and its provisions became a part of the new instrument.<sup>1</sup> This went to the people as a whole and not, as had been urged, in part, and was accompanied by an address in which the voters were asked to make their "choice between the old and the amended constitution."<sup>2</sup> The latter was ratified by an overwhelming majority,<sup>3</sup> and besides introducing and firmly establishing the principle of popular ratification in New York, it remained the fundamental law of the state for practically a quarter of a century.

In 1846 another convention met, called in pursuance of a vote of the people, and framed an instrument which greatly simplified the system of amendment,<sup>4</sup> authorizing proposals to be submitted by a majority vote of a single legislature and to be ratified by a majority of those "voting thereon." This was a combination of the plans in

<sup>1</sup> New York Constitution (1821), Art. VIII; Poore, "Charters and Constitutions," II, 1348, 1349.

<sup>2</sup> Proceedings and Debates, 658.

<sup>3</sup> The vote was 75,422 in favor and 41,497 against. Hammond, "History of Political Parties in New York," II, 94.

<sup>4</sup> Art. XIII; Poore, "Charters and Constitutions," II, 1365, 1366.

operation in Maine and Pennsylvania and to it was added a modification of the New Hampshire method of consulting the people periodically, the New York instrument providing for submitting every twenty years a proposal for a new convention. This plan was widely copied in the Western constitutions, and under it were called the New York conventions of 1867 and 1894, each of which gave a new fundamental code to the Empire state.

### *C. New Jersey*

The constitution proclaimed in New Jersey in 1776, like many others of that period, made no provision for amendment, yet it remained in force for almost two generations. However, "during the latter years of its supremacy a new constitution was earnestly advocated,"<sup>1</sup> and in 1844 the legislature passed an act providing for the election of delegates to a constitutional convention.<sup>2</sup> There seems to have been no preliminary consultation of the people regarding the necessity for this, but the act provided: <sup>3</sup> —

"That for the purpose of ascertaining the sense of the people, as to the adoption or rejection of the constitution agreed upon by said convention, an election shall be held in the several counties of this state, on the second Tuesday in August next; and every person qualified to vote for delegates to the convention authorized by this act shall be entitled to vote at such election."

The old constitution imposed a property test,<sup>4</sup> but by this statute

"The property qualification contained in that constitution was eliminated, and in place of a residence within the county for one year preceding the last election, the act of 1844 conferred the right of suffrage upon citizens who resided within the state for one year and in the county for five months next preceding said election."<sup>5</sup>

The convention met at Trenton and completed its labors in about six weeks.<sup>6</sup> Its amendment clause<sup>7</sup> was taken directly from the then recent Pennsylvania constitution, and well illustrates the influence which the states of the middle group were exerting upon each other. The instrument received nearly seven-eighths of the vote cast at the

<sup>1</sup> De Pue, J., in *Bott v. Secretary of State*, 62 N.J.L. 119.

<sup>2</sup> New Jersey Acts, 1843-1844, 111.

<sup>3</sup> *Id.* sec. 9, 113.

<sup>4</sup> Art. III; Poore, "Charters and Constitutions," II, 1311.

<sup>5</sup> *Bott v. Secretary of State*, 62 N.J.L., 119, 121.

<sup>6</sup> Poore, "Charters and Constitutions," II, 1314, note.

<sup>7</sup> *Id.* 1323, Art. IX.



election at which it was submitted <sup>1</sup> and as a whole has never been displaced. Comprehensive amendments were ratified in 1875 <sup>2</sup> and others in 1890 and 1897.<sup>3</sup>

#### *D. Delaware*

The one state in the Union which has never enjoyed a popularly ratified constitution is Delaware. As was for a long time the case in Maryland, the promise of its early history in this regard has not been fulfilled. Delaware's first constitution, proclaimed in 1776, gave place only sixteen years later to another, which though not submitted, contained the first express recognition, in any constitution of the middle states, of the practice of popular ratification. After providing for amendment by two successive legislatures according to the Maryland system, but requiring a larger majority, the instrument declared:—

"No convention shall be called but by the authority of the people; and an unexceptionable mode of making their sense known will be for them, at a general election of representatives, to vote also by ballot for or against a convention, as they shall severally choose to do; and if thereupon, it shall appear, that a majority of all the citizens in the State, having a right to vote for representatives, have voted for a convention, the general assembly shall accordingly, at their next sessions, call a convention." <sup>4</sup>

It was suggested above that this was the earliest instance of the kind in the middle states. It was, indeed, one of the earliest anywhere in the Union; for while Massachusetts and New Hampshire had recognized the principle in their constitutions of a few years previous, the only other state to do so had been Kentucky, whose convention had adjourned less than two months prior to that of Delaware.<sup>5</sup> It was not until 1831, however, that another convention met and it did little more than reenact the old constitution (including the clause above quoted) with some important amendments.<sup>6</sup>

Thus, while the remaining middle states were all enjoying popular constitutions before the middle of the nineteenth century, Delaware, the first of that group to recognize the doctrine in a constitu-

<sup>1</sup> 20,276 as against 3526.

<sup>2</sup> Poore, II, 1325 *et seq.*

<sup>3</sup> *Bott v. Secretary of State*, 62 N.J.L. 121.

<sup>4</sup> Art. X; Poore, "Charters and Constitutions," I, 287.

<sup>5</sup> Jameson, "Constitutional Conventions," 647, 278.

<sup>6</sup> *Id.* 289, and note.

tion, failed, and as we shall see, still fails, to apply the principle to such an instrument.<sup>1</sup>

Influenced probably by the example of the neighboring states of New Jersey and Maryland, which had then recently adopted new constitutions, the Delaware legislature in 1851 passed an act submitting to the voters the question of calling a convention. The proposal received a majority of the votes cast thereon, but not the votes of a "majority of all the citizens of the state having a right to vote for representatives,"<sup>2</sup> as required by the existing constitution. Nevertheless a constituent act was passed in 1852, declaring that a majority of votes had been cast for the convention. The latter accordingly met at Dover on the ensuing December and framed an instrument which, for the first time in Delaware's history, was referred to the electors in 1853. The result was a rejection<sup>3</sup> in which the suspicion cast on the validity of the constituent body had, no doubt, some share, and for almost a generation there was no further attempt at constitutional revision in Delaware, and then only in the eighteenth century mode.

<sup>1</sup> It has, however, begun to apply it in ordinary legislation. See *post*, 366.

<sup>2</sup> Jameson, "Constitutional Conventions," 210, note.

<sup>3</sup> *Id.* 646.

## CHAPTER XVI

### POPULAR RATIFICATION IN THE OLD NORTHWEST TERRITORY

#### A. *Early Popular Law-Making*

THE region between the Great Lakes and the Ohio was the meeting place of two distinct streams of immigration, one from the South, moving northward across the river, and the other from New England. How the settlers carried with them their stock of political ideas, accumulated in their respective sections, and especially their notions of popular government, and how these were to blend and develop in the fertile soil of the Northwest Territory are well illustrated and foreshadowed by two instances at the outset of its history.

In October, 1783, the General Assembly of Virginia passed an act <sup>1</sup> providing for the location and survey of certain lands northwest of the Ohio River, previously granted to General George Rogers Clark and those who had served under him in the then recent war. Incidentally the act provided for the establishment on one portion of the tract of a town to be known as Clarksville <sup>2</sup> and designated a board of ten trustees which should be self-perpetuating by coaptation. The trustees met and organized at Louisville, just across the river on the southern side,<sup>3</sup> on August 7 of the following year and proceeded to carry out the terms of the act.<sup>4</sup> But while these trustees were vested with the title for the purposes of sale, and with power to determine disputes concerning the boundaries of the lots, there appears to have been no provision for the permanent government of the

<sup>1</sup> Hening, *Virginia Statutes at Large*, II, Chap. XXI.

<sup>2</sup> Doubtless in honor of General Clark. His later years were passed at this place. Thwaites, "Clark," 70.

<sup>3</sup> See note by Carl Evans Boyd, *American Historical Review*, II, 691. It is "now but a cluster of dwellings on the outskirts of New Albany, a manufacturing town which is rapidly absorbing all the neighboring territory." — Thwaites, "On the Storied Ohio," 220.

<sup>4</sup> *American Historical Review*, II, 691.

town other than the guaranty that the purchasers should "enjoy all the rights, privileges, and immunities which the freeholders and inhabitants of other towns in this state, not incorporated, hold and enjoy."<sup>1</sup> Here again we find a recurrence of the phenomenon which we have noticed so often in New England and the South, of a newly formed community, cut off from all present connection with former political associates, improvising a governmental machinery of its own and instinctively reproducing primitive and archaic forms. The settlers assembled in a folkmoot which is described in its record<sup>2</sup> as "a Convention held at Clarksville on thursday the 27th of January, 1785, by the Inhabitants of the Town for the purpose of forming some Laws or regulations to remedy sundry grievances which the said Inhabitants have hitherto lain under." After selecting William Clark chairman, the "convention" proceeded to adopt a series of seven "Resolves," the first of which recited: —

"That whereas the Honble the Congress of the united States have not as yet adopted any mode or plan for the Regulation and Government of this our infant Settlement, and it is become necessary to form certain Regulations for the better security of our Lives and property; The Inhabitants of this Town have a right to assemble from time to time and enact suitable Laws to maintain peace and tranquility among the People; and which may not be incompatuble with the Constitution of the united States, or the Resolutions of Congress."

The remaining "Resolves" provide for the establishment of a judicial tribunal of four members with power to hear and determine controversies, and enforce its judgments as in the case of the communities of the South.<sup>3</sup> This jural characteristic was its most conspicuous one, and while it lacked some of the covenant features of the Southern instruments, this piece of legislation was on the whole a fairly complete and satisfactory code.<sup>4</sup> But its chief interest lies in the fact that it was the first popular constitution in the old North-

<sup>1</sup> Hening, Statutes, II, 387.

<sup>2</sup> Draper Mss., Wm. Clark Papers, I, 103, 105, reprinted in *American Historical Review*, II, 691-693.

<sup>3</sup> See *ante*, Chap. VIII.

<sup>4</sup> At least no alteration seems to have been made for nearly two years and then only in an unimportant detail. On November 12, 1787, a "Convention" of "a majority of the Inhabitants of the Town. . . . Resolved, that whereas the Sixth Resolution held in this Town the 27th day of January, 1785, directing the Goods of a Debtor to be sold a Short period [upon eight days' notice] after judgment obtained against them, is found to be oppressive, the same is hereby repealed and made void." — *American Historical Review*, II, 693.

west Territory. Not only did it antedate by a considerable time the famous ordinance of 1787, but it sprang directly from the people instead of being, as in the case of the latter, imposed upon them by an outside authority. Crude and imperfect, the Clarksville compact contained the germs and essentials of the later state constitutions of the Northwest, — the declaration of the rights and sovereignty of the people, and the framework of government, — and gave promise of what was to follow.

The other instance of early popular law-making in the Northwest occurred in what was known as the "Miami Purchase," which lay between two rivers of that name. This region was colonized by the "Miami Company," which had been organized in New Jersey, but it probably included many from the Ohio Company, whose colonists had come directly from New England,<sup>1</sup> and therefore represents the political experience of the North as the Clarksville compact does that of the South.

"When these settlements were commenced," says Judge Burnet,<sup>2</sup> "by emigrants who resorted to them, early in 1788, provision had not been made for the regular administration of justice. Judicial Courts had not been organized, and the inhabitants found themselves in an unpleasant situation, as they were exposed to the depredations of dishonest, unprincipled men, without the means of legal redress. To remedy that evil the people assembled to consult and devise a plan for the common safety; they chose a Chairman and a Secretary, and proceeded to business. The meeting having resulted in the adoption of a code of By-Laws for the government of the settlement, in which they prescribed the punishment to be inflicted for various offences, — organized a Court, — established trial by jury, — appointed Mr. McMillan Judge, and John Ludlow Sheriff.

"To these regulations they all agreed, and each gave a solemn pledge to aid in carrying them into effect."

### *B. Ohio*

These early instances proved that the first settlers of the Northwest Territory were ready for the task of popular constitution-making. That they did not at first undertake it was due to no act of theirs. The first state constitution in the Northwest was authorized by the enabling act for Ohio in 1802, which, as is elsewhere shown,<sup>3</sup> pro-

<sup>1</sup> See Burnet's "Notes on the Northwest Territory," 46-52.

<sup>2</sup> *Id.* 57.

<sup>3</sup> See *post*, Chap. XIX.

vided for a convention "to form a constitution and state government,"<sup>1</sup> and allowed the people no actual share in the process. It was natural that these colonists of the Northwest, trained in the school of local self-government and independence, should resent this autocratic exercise of congressional authority. At an assembly of the citizens of Dayton and vicinity, on September 26, 1802, a series of resolutions was unanimously adopted declaring that —

"we consider the late law of Congress for the admission of this Territory into the Union, as far as it relates to the calling a Convention, and regulating the election of its members, as an act of legislative usurpation of power properly the province of the Territorial Legislature, bearing a striking similarity to the course of Great Britain, imposing laws on the provinces. We view it as unconstitutional, as a bad precedent, and unjust and partial as to the representation in the different counties."<sup>2</sup>

An emphatic protest was made against the transfer of Wayne County (including Detroit), and the assembly voiced its demands for a popular initiative as follows: —

"We wish our Legislature to be called immediately to pass a law to take the enumeration; to call a Convention; and to regulate election of members to the same, and also the time and place for the meeting."<sup>3</sup>

Nevertheless, this first of the enabling acts remained unaltered, and under it an election of delegates was held, and the convention assembled at Chillicothe, November 1. Governor St. Clair addressed the convention, denouncing the enabling act, and repeating the objections of its opponents. The delegates, however, by an all but unanimous vote,<sup>4</sup> decided to proceed with their task. The instrument framed by this convention was not, of course, referred to the people. But it contained a clause<sup>5</sup> (the first of its kind in the Northwest Territory), requiring them to be directly consulted in calling future conventions. And this clause was not similar to any which had yet appeared in the constitution of any Eastern state; it embodied almost literally the provision of the Tennessee constitution of six years before,

<sup>1</sup> United States Statutes at Large, II, 174, sec. 5.

<sup>2</sup> Burnet, "Notes on the Early Settlement of the Northwest Territory," 501.

<sup>3</sup> Id.

<sup>4</sup> The one negative vote out of thirty-five members was that of Judge Ephraim Cutler of Marietta, son of Dr. Manasseh Cutler, one of the reputed authors of the famous ordinance of 1787. See Hinsdale, "The Old Northwest," 322, 323.

<sup>5</sup> Ohio Constitution, 1802, Art. VII, sec. 5; Poore, "Charters and Constitutions," II, 1461.

but it deferred its operation until 1806, and provided that it should not be used for introducing slavery. Truly here was a curious blending of New England with Southern ideas. Of the balance of the convention's work, an Ohio historian has said : <sup>1</sup> —

"The instrument so adopted, it would be respectful to pass in silence. It was framed by men of little experience in matters of state. . . . With such a model of simplicity and strength . . . as the national constitution which had just been formed, the wonder is that some of its ideas were not borrowed. It seems to have been studiously disregarded."

Nevertheless, the same author thinks that —

"In the presence of the popular manifestations, both before and after this vote, it is idle to contend that the people of the territory were averse to it."<sup>2</sup>

Some "popular manifestations" which we have noticed would seem to indicate quite the contrary. Still the fact remains that this unratified and objectionable constitution continued in force almost half a century.

By 1849 the movement for popular ratification in the surrounding states had been practically completed, and in that year a majority of Ohio electors voted for a constitutional convention. In the following year a constituent act was passed, providing that, "the amendments, revisions or alterations agreed upon by said convention, shall be submitted to the people for their adoption or rejection, by a vote for that purpose, at such time as the convention shall direct."<sup>3</sup> The body thus provided for assembled at Columbus in May, 1850, but adjourned in July, on account of the cholera epidemic, to reassemble at Cincinnati in December. The instrument framed by it provided expressly for its own submission, retained the clause regarding a consultation of the people relative to future conventions, and added, apparently from the second Michigan constitution which had just been framed, the Maine system of submitting amendments, and the New Hampshire idea of periodical resubmission.

But it did more than borrow from other states, for it contained the following provision, — the first of its kind in any state constitution : —

"No amendment of this constitution agreed upon by any convention assembled in pursuance of this article shall take effect until the same shall have been sub-

<sup>1</sup> King, "Ohio" (American Commonwealths), 290, 291.

<sup>2</sup> *Id.* 290.

<sup>3</sup> Ohio Laws, 1849-1850, 22, sec. 7.

mitted to the electors of the State, and adopted by a majority of those voting thereon.”<sup>1</sup>

We shall discover a tendency to follow this in the constitutions framed at the close of the nineteenth century.

This second Ohio instrument was adopted by a substantial,<sup>2</sup> though not pronounced, majority, and in spite of an attempt<sup>3</sup> in 1874 to displace it, remains the organic law of the state.

### C. Indiana

Notwithstanding the first instance of popular law-making in the Northwest Territory occurred within the present boundaries of the Hoosier state,<sup>4</sup> its people were not allowed to participate directly in the formation of its first constitution. The enabling act, passed by Congress in 1816, pursuant to a petition from the territorial legislature adopted in the preceding year, contained the phraseology common to such enactments at that period,<sup>5</sup> and authorized a convention “to form a constitution and state government for the people.”<sup>6</sup> Such a body met at Corydon, then the territorial capital, on June 10 of the same year. Its personnel was not distinguished,<sup>7</sup> and it remained in session but twenty days. The chief interest centred in slavery, which the new constitution prohibited, and the instrument was proclaimed without submission as the enabling act designed that it should be. But though these farmer statesmen of territorial Indiana did not, and probably could not, leave their work to the people, they showed themselves in touch with the democratic movement of the times by inserting in their constitution<sup>8</sup> the following:—

“Every twelfth year after this constitution shall have taken effect, at the general election held for governor, there shall be a poll opened, in which the qualified electors of the State shall express, by vote, whether they are in favor of calling a convention or not; and if there should be a majority of all the votes given

<sup>1</sup> Ohio Constitution, 1851, Art. XVI, sec. 3; Poore, II, 1479.

<sup>2</sup> The vote was 125,564 to 109,276, not including two counties received too late to be counted.

<sup>3</sup> Jameson, “Constitutional Conventions,” 650.

<sup>4</sup> The Clarksville Compact, see *supra*, 251.

<sup>5</sup> See *post*, Chap. XIX.

<sup>6</sup> United States Statutes at Large, Chap. LVII, sec. 4, p. 289.

<sup>7</sup> “The majority of the members were frontier farmers who had a general idea of what they wanted, and had sense enough to let their more erudite colleagues put it in shape.” — Dunn, “Indiana,” 424.

<sup>8</sup> Art. VIII; Poore, “Charters and Constitutions,” I, 508.



at such election, in favor of a convention, the governor shall inform the next general assembly thereof, whose duty it shall be to provide by law for the election of the members to the convention, the number thereof, and the time and place of their meeting, which law shall not be passed unless agreed to by a majority of all the members elected to both branches of the general assembly; and which convention, when met, shall have it in their power to revise, amend or change the constitution."

This, it will be seen, was not the provision which Ohio had copied from Tennessee. It was more like the Kentucky clause, framed nearly a quarter of a century previous, and shows the influence of those who, like the Clarksville settlers, had come into the state from the South. But it indicates also the influence of New England ideas. For this plan of periodical consultation of the people had appeared in the New Hampshire constitution of 1784, and, as yet, nowhere else. Here again, therefore, the ideas of the East and the South were blended.

The first settlers within the borders of Indiana who set up a government of the people at Clarksville established a precedent which was never wholly departed from in the Hoosier State. When, a generation after the first convention, it seemed advisable to call another, the legislature first passed an act for taking the sense of the voters on the question.<sup>1</sup> And when the sovereign people had duly given its assent to this, a convention to frame a constitution was provided for by a statute which required that "there shall be a vote taken on the . . . adoption or rejection of said constitution,"<sup>2</sup> and the instrument thus provided for was ratified by the electors, and remains to this day the fundamental code of Indiana.<sup>3</sup>

#### *D. Illinois*

The enabling act of Illinois, like those of the two states which had preceded it from the Northwest Territory, left it to a convention to frame a constitution and state government.<sup>4</sup> But in the territory itself, democratic ideas appear to have gained an early foothold, for we are told that "in the election of members to the convention, the

<sup>1</sup> Indiana Laws (1848-1849), Chap. XXXIV.

<sup>2</sup> Id. 1850, Chap. XXIX, sec. 2, p. 54.

<sup>3</sup> Jameson, "Constitutional Conventions," 651.

<sup>4</sup> 3 United States Statutes at Large, 428. This act, like that for Indiana, was passed in response to a petition from the territorial legislature. See Ford, "History of Illinois," 19.

only questions made before the people were the right of the constituent to instruct his representative, and the introduction of slavery, which were debated with great earnestness during the canvass."<sup>1</sup> The desire of the people of Illinois to share directly in the making of laws was thus evident from the beginning, and has been abundantly manifested throughout the later history of the state.

The convention thus provided for and chosen assembled at Kaskaskia in the summer of 1818.<sup>2</sup> "It was composed," writes a local historian,<sup>3</sup> "of thirty-three members, chiefly farmers of limited education, but many of whom were not without fine natural abilities, sound judgment and experience in public affairs." The task imposed upon these western Cincinnati was not, however, one requiring original or constructive statesmanship. They had before them the then recent example of the convention of Indiana, with which state theirs had been originally connected, and they appear to have made good use of it.

"The first constitution of Illinois," says the author last quoted,<sup>4</sup> "was in its principal provisions a copy of the then existing constitutions of Kentucky, Ohio and Indiana. The bill of rights is almost identically the same in each, with the exception of the clauses relating to slavery. Many of the articles are exact copies in wording although differently arranged and numbered."

But there was one provision in this new instrument which was materially different from anything in the constitutions of Indiana or Kentucky. This was the article relative to the calling of constitutional conventions, which was, like that of Ohio, almost a literal copy of the Tennessee provision of 1796. This fact seems to have escaped the notice of the historians, but its explanation appears to lie in another fact which all historians of the convention do notice. "The principal member of it," says Governor Ford,<sup>5</sup> "was Elias K. Kane, late a senator in Congress . . . to whose talents we are mostly indebted for the peculiar features of the constitution."

Mr. Moses,<sup>6</sup> after remarking that Kane was one of the five lawyers

<sup>1</sup> Ford, 25.

<sup>2</sup> Moses, "Illinois, Historical and Statistical," I, 282 *et seq.*, gives what seems to be the best account of this convention. He says: "There is no official record of its proceedings among the state archives. If any was made or published, neither the original nor any copy has been preserved."

<sup>3</sup> Id.

<sup>4</sup> Id. 284.

<sup>5</sup> "History of Illinois," 24.

<sup>6</sup> "Illinois, Historical and Statistical," 283. Cf. Stevenson, "Constitutional Conventions," etc., Pub. Ill. State Hist. Lib. 22.

in the convention, observes that he "was its leading spirit, and to him must be awarded the credit of the arrangement, as well as of the composition, wherever original matter was introduced into the instrument adopted."

Now Kane, though a New Yorker by birth, had "removed in early youth to Tennessee."<sup>1</sup> "After having been admitted to the bar he commenced the practice of law in Nashville."<sup>2</sup> As a lawyer, he must have been familiar with the constitution of his adopted state, and its environment appears from his later career to have had more influence upon him than that of his nativity, for he became in Illinois an advocate of slavery.<sup>3</sup>

The source, then, of this provision for consulting the people in the first constitution of Illinois, is no longer a mystery. The man who is most nearly entitled to be called its author borrowed one of the distinctive features of that constitution which he knew most about. Thus the idea of consulting the people directly in constitutional changes came into Illinois not from New England, whose exclusive property it is sometimes claimed to be, but from the far South. It is an echo of those compacts which had begun to appear among the frontiersmen of Tennessee nearly half a century before — a seed sprouting in the southern Alleghanies, but carried by chance far from its mountain home to find lodgment and growth in the favorable soil of the northwestern prairies. Such a phenomenon the botanist beholds when he finds a strange fauna in regions remote from its habitat and speculates upon the agencies that have brought it thither. By such curious and yet natural modes has our constitutional development proceeded!

The Kaskaskia convention closed a session of twenty-three days after declaring, as it was expected to do,<sup>4</sup> that its work was law. But it was not long until the provision for consulting the people was util-

<sup>1</sup> Ford, "History of Illinois," 24.

<sup>2</sup> Washburn, "The Edwards Papers," Chicago Historical Society's Collections, III, 560, note.

<sup>3</sup> *Id.* 124, note.

<sup>4</sup> Mr. Moses ("Illinois, Historical and Statistical," 284-285) criticises the work of the convention because it left too little power in the hands of the people. They were allowed to elect the incumbents of but five offices and "they were not even permitted to have a voice in the adoption of their fundamental law." But clearly nothing else was contemplated by an enabling act which directed the convention "to form (not merely frame) a constitution," and contained no authority express or implied to delegate such power or any part of it.

ized, and this, strangely enough, by the advocates of slavery. That institution had been only partially recognized by the instrument of 1818. In 1823 the legislature passed, after much manœuvring and excitement, a resolution asking the electors to determine whether a convention should be called to frame a new constitution. It was well understood that this proposal was in the interests of slavery extension and the canvass which followed was both prolonged and exciting.<sup>1</sup> Even the Covenanters who, up to this time, had abstained from any participation in elections, now turned out to vote against slavery.<sup>2</sup> The vote on the proposal on August 2, 1824, exceeded that on candidates for congress who were voted for at the same election. The proposal was defeated by the decisive vote of 6640 to 4972. But the people of Illinois had received a powerful object lesson in popular participation in constitution-making.

More than a score of years passed before the question of calling a convention was again submitted to the people of Illinois. The growth of the state, however, made necessary some changes in its fundamental law, and the legislature which assembled in 1846 passed a resolution submitting the question to the voters. The election occurred in August of the following year,<sup>3</sup> and the proposal was adopted by a favorable vote two and one-half times as great as that in opposition.<sup>4</sup> Thereupon the legislature passed the constituent act, which contained the following significant provision:—

“The said amendments, revisions or alterations shall be submitted by the convention to the people, for their adoption or rejection, at the election to be held on the fourth Monday in October, in the year of our Lord one thousand eight hundred and forty-seven, and every person entitled to vote by the constitution and laws now in force may vote thereon, in the election district in which he shall reside, and not elsewhere.”<sup>5</sup>

Popular ratification had now become part of the written law of Illinois. The convention which met at Springfield in pursuance

<sup>1</sup> See Moses, 316 *et seq.*, for an account of this period.

<sup>2</sup> Ford, “History of Illinois,” 54.

<sup>3</sup> Moses, 511. Ex-Vice-President Stevenson (“The Constitutional Conventions and Constitutions of Illinois,” Pub. No. 8 of the Ill. State Hist. Lib., 24) says that the election took place in 1846.

<sup>4</sup> Moses, 511, note. The figures were 58,339 against 23,013 in a total vote of 99,654.

<sup>5</sup> Illinois Laws, 1847, 35, sec. 6, p. 35.

of this act, not only retained the provision borrowed from Tennessee for consulting the people in calling conventions, but also provided for the submission by two successive legislatures of constitutional amendments directly to the people.<sup>1</sup>

When the convention submitted its work, it accompanied the submission with an address in which it was declared :—

“Availing themselves of the light furnished by a highly advanced state of political science your delegates have sought to adapt their efforts to the demands of the growing interests and population of the state, consulting at all times the popular will whenever it could be ascertained.”<sup>2</sup>

The new constitution was decisively ratified by the people and became the fundamental law of Illinois in April, 1848.<sup>3</sup>

The new revision clause was applied in 1851, when an amendment relating to the state's revenue system was ratified.<sup>4</sup>

The Lincoln and Douglas contest for the senatorship seven years later was really a plebiscite, for not only was the plan of popular election applied for the first time to that office but it was well understood that the voters were expressing themselves directly upon the plans proposed by the respective candidates for dealing with slavery in the territories.

In 1861, after a consultation of the people, and pursuant to a legislative act, delegates were chosen to a convention at Springfield the following year.<sup>5</sup> It seems to have been designed to remedy certain defects in the existing instrument, but the voters demonstrated that their part in the making was not a perfunctory one by rejecting it.<sup>6</sup>

The latest constitution of Illinois came from a convention which met at Springfield in December, 1869, and continued in session until May, 1870. It contained the provision of its predecessors for consulting the people and added a requirement that the instrument framed by any such convention should be submitted to the voters.<sup>7</sup> More than this, it brought even the delegate system nearer to the people by providing a plan of minority representation.<sup>8</sup> The entire

<sup>1</sup> Art. XII, sec. 2; Poore, I, 465. But one article could be amended at a time, and a “majority of all the electors voting at such election for members of the [h]ouse” was required in order to ratify.

<sup>2</sup> Stevenson, “Constitutional Conventions,” etc., 25.

<sup>3</sup> Id.

<sup>4</sup> Poore, I, 470.

<sup>5</sup> Stevenson, “Constitutional Conventions,” etc., 27.

<sup>6</sup> Id.

<sup>7</sup> Art. XIV, sec. 1; Poore, I, 490.

<sup>8</sup> This was a favorite measure of the late Joseph Medill, then of the *Chicago Tribune*.

instrument was ratified by an overwhelming vote,<sup>1</sup> and remains in force as one of the best types of the later nineteenth century constitutions.

The state of Illinois thus boasts a record of three quarters of a century of constitution-making, marked by a steadily increasing share awarded to the people, and it opened the century with a new chapter by adopting the advisory initiative and referendum by legislative act.<sup>2</sup>

### *E. Michigan*

Constitution-making in Michigan began without the hindrance of an enabling act such as had practically eliminated popular initiative in the southern tier of states formed from the Northwest Territory. And while the latter had advanced to the point where they provided in their respective instruments for an appeal to the people in calling future conventions, the first actual submission to the electors within that territory was made in the North American Chersonese.

In January, 1835, the "legislative council" of Michigan passed an act providing for a constitutional convention and the election of delegates thereto.<sup>3</sup> No provision had been made for taking the sense of the people on the question, but delegates were chosen in the ensuing April and on the 11th of the next month the convention met at Detroit.<sup>4</sup> It remained in session considerably longer<sup>5</sup> than the conventions of Indiana and Illinois had done, and its work was more permanent and satisfactory. Judge Cooley says<sup>6</sup> that in the scope and delimitation of its provisions "it may well be regarded as a model." It was the provisions for its own adoption and amendment, however, that render the instrument a landmark in the constitutional history of the Northwest.

Although the constituent act contained no requirement or hint of submission, the convention inserted in the schedule<sup>7</sup> of the proposed draft the following clause:—

"This constitution shall be submitted at the election to be held on the first Monday in October next, and on the succeeding day, for ratification or rejection to the electors qualified by this constitution to vote at all elections and if the same

<sup>1</sup> 152,227 to 35,443.

<sup>2</sup> Illinois Laws, 1901, 198.

<sup>3</sup> Michigan Laws, 1834-1835, 72-74.

<sup>4</sup> See Cooley, "Michigan" (Commonwealth Series), 214.

<sup>5</sup> It adjourned June 29. See Poore, I, 983, note.

<sup>6</sup> "Michigan," 225.

<sup>7</sup> Sec. 9; Poore, I, 992.

be ratified by the said electors the same shall become the constitution of the state of Michigan."

But this was not the only feature by which these Michigan constitution-makers showed themselves to be in advance of their immediate neighbors. They provided <sup>1</sup> for submitting to the people all future amendments to their new instrument, and they did this by incorporating almost verbatim <sup>2</sup> the amending clause of the New York constitution of fourteen years previous. This had been borrowed, as we have seen, with slight change of verbiage, from the Connecticut instrument of 1818. But they went beyond either of these states in another important particular. Heretofore constitutional provisions for amendment had contemplated only a partial change in the instrument of which they formed a part. But this Michigan constitution provided expressly for the submission at any time by the legislature of a proposal for a convention "to revise or change this entire constitution." <sup>3</sup>

Borgeaud says that this instrument "was at that time considered the model of democratic institutions." <sup>4</sup> It was ratified pursuant to its own provisions, by a pronounced majority <sup>5</sup> of the voters, and transmitted to Congress by President Jackson accompanied with a special message. <sup>6</sup>

In 1850 a new constitution was adopted whose revision clause bears evidence of having been copied from the then recently rejected constitution of Wisconsin. There was the same blending of the Maine system of submitting amendments by one legislature <sup>7</sup> and the New Hampshire method of periodically consulting the people as to calling a convention; <sup>8</sup> and it affords a striking illustration of the reflex influence of a daughter state upon the mother and a reversal of the usual process.

In 1867 and 1873 new instruments were framed and submitted to the people of Michigan, <sup>9</sup> but failed to receive their assent; and they

<sup>1</sup> Art. XIII, sec. 1; Poore, I, 991.

<sup>2</sup> The only change was the substitution of "House of Representatives" for "Assembly."

<sup>3</sup> Art. XIII, sec. 2; Poore, I, 991.

<sup>4</sup> "Adoption and Amendment of Constitutions," 162.

<sup>5</sup> 6299 to 1350. See Jameson, 652.

<sup>6</sup> Congressional Globe, II, 19.

<sup>7</sup> Art. XX, sec. 1; Poore, I, 1012. This had also been incorporated into the New York constitution of 1846, Art. XIV, sec. 2. See Poore, II, 1366.

<sup>8</sup> Art. XX, sec. 2.

<sup>9</sup> Jameson, "Constitutional Conventions," 653; *American Pol. Sc. Rev.* II, 444.

continued for more than a half century under their second constitution, meanwhile proving their adherence to the state's early traditions by ratifying numerous amendments,<sup>1</sup> as occasion has required.

In the autumn of 1907 a constitutional convention<sup>2</sup> assembled at Lansing and its debates gave promise of a still greater advance toward popular law-making. Among its early proposals was one<sup>3</sup> to incorporate the initiative and referendum in ordinary legislation. This was not adopted, but the instrument framed by the convention did provide<sup>4</sup> an elaborate method of constitutional amendment upon petition of twenty per cent of the electors whose signatures must be inscribed "at a regular registration or election under the supervision of the officials thereof." But this method is not applicable to the article which embodies it, and is, moreover, subject to disapproval by the legislature. The new constitution was ratified in 1908.

#### *F. Wisconsin*

In this, the last of the states formed from the Northwest Territory, the tendency was stronger from the beginning than in any other state in this group to consult the people. At the second session of the territorial legislature which convened at Madison, in 1838, Governor Dodge recommended that steps be taken to get the sense of the people on the question of establishing a state government.<sup>5</sup> No result having been obtained, the proposal was renewed the following session, and again at the next, and at this latter session (1840-1841) a plebiscite was authorized. The result was overwhelmingly against statehood,<sup>6</sup> and two subsequent submissions of the question met a similar fate.<sup>7</sup> After unsuccessful attempts in 1844 and 1845 to re-submit the question, such a measure was finally passed in January, 1846.<sup>8</sup> It provided that in case the vote was favorable to statehood, a constitutional convention should be chosen, and further —

"Said convention shall have power to submit the constitution adopted by them to a vote of the people, if they shall deem proper; and to provide how the votes cast upon that subject shall be taken, canvassed and returned, and shall also have power to submit the said constitution to the Congress of the United

<sup>1</sup> See Poore, I, 1016, 1019.

<sup>2</sup> See *American Pol. Sci. Rev.* II, 443.

<sup>3</sup> By Delegate Ingram.

<sup>4</sup> Art. XVII.

<sup>5</sup> Tenny and Atwood, "Fathers of Wisconsin," 18.      <sup>6</sup> 499 to 92. Id. 19.

<sup>7</sup> In 1843 the vote was 1821 to 619, and in 1844 it was 1276 to 541. Id.

<sup>8</sup> Wisconsin Laws, 1846, 5.



States and to apply for the admission of Wisconsin into the Union of the United States as a sovereign state: *Provided*, that said constitution shall be eventually ratified by the people either before or after the action of Congress upon the same."<sup>1</sup>

Thus Wisconsin alone, of all the states in the Northwest Territory, began by requiring that its first constitution be "ratified by the people." This time the proposals of the act received the popular assent and the election of delegates followed. The convention which met at Madison, in October, 1846, had a membership "of great, if not extraordinary, intellectual ability."<sup>2</sup> More than one-fifth were lawyers, including the distinguished Edward G. Ryan, afterward Chief Justice of the Supreme Court, and others prominent in the later political and judicial history of the state.<sup>3</sup> Of the one hundred and twenty-four members, all but twelve were native Americans, more than one-third from New York, and almost an additional one-third from New England.<sup>4</sup> These figures throw not a little light on the sources of the instrument which the delegates evolved. When the Madison convention assembled, the fourth constitutional convention of New York was just closing its labors,<sup>5</sup> and there is reason to believe that its work was closely studied by the Wisconsin delegates, of whom so large a proportion hailed from the Empire State. The article on amendment and revision,<sup>6</sup> *e.g.* not only required ratification of the newly framed instrument itself,<sup>7</sup> but incorporated the feature of periodical resubmission of convention proposals which New York had just borrowed from New Hampshire, and which Indiana and Iowa had previously adopted. But in providing for separate amendments the Wisconsin convention adopted substantially the simplified and popular system which Maine had formulated a quarter of a century before,<sup>8</sup> dispensing with the second appeal to the legislature and authorizing the submission of amendments by a two-thirds vote at one session.<sup>9</sup>

The Wisconsin instrument of 1846 was a notable one,<sup>10</sup> in several

<sup>1</sup> Wisconsin Laws, 1846, 11, sec. 22.

<sup>2</sup> Tenny and Atwood, "Fathers of Wisconsin," 19.

<sup>3</sup> *Id.* 24.

<sup>4</sup> *Id.* 20.

<sup>5</sup> It adjourned four days after the Wisconsin body convened.

<sup>6</sup> Art. XVIII; Tenny and Atwood, 324, 325.

<sup>7</sup> Art. XIX, sec. 9.

<sup>8</sup> See *ante*, "Maine," Chap. XIII.

<sup>9</sup> *Id.*

<sup>10</sup> Its text is printed in Tenny and Atwood's "Fathers of Wisconsin," 303 *et seq.*, and the authors remark that it "was not included in the journal of the convention nor published, except in pamphlet form, and is now (1880) out of print and rarely to be found even in public libraries."

particulars, but some of its provisions<sup>1</sup> were objectionable to the voters of that day, and among these was the clause providing for periodical resubmission, which was deemed cumbersome and expensive.<sup>2</sup> After "an exciting contest,"<sup>3</sup> the vote of the people was taken on April 6, 1847, and the proposed constitution rejected by a vote of 20,232 to 14,119.<sup>4</sup> A separately submitted clause conferring the right of suffrage upon negroes received but 7564 votes as against 14,615.<sup>5</sup>

But the rejection of the work of this first convention did not stay the movement for statehood nor prevent a new appeal to the people. Within a few months an extra session of the legislature was called and provision made for another convention, which, after the election of delegates, met at Madison on December 15, 1847. It was a smaller body and, supposedly, more conservative though not less distinguished in personnel than its predecessor. Its work was largely a reproduction of the first instrument, but the clauses which had excited opposition were omitted or evaded, and the provisions for amendment and revision were less advanced and simple. Not only did the new draft exclude the periodical resubmission feature and provide for submitting the question of calling a convention only when the legislature should deem it necessary,<sup>6</sup> but it also abandoned the plan of submitting amendments by one legislature and restored the New York system of requiring a majority vote of two successive legislatures.<sup>7</sup> But other clauses indicated that the convention was not desirous of curtailing the share of the people in legislation, for some of the questions which had troubled the first convention were disposed of by providing for a genuine referendum. The rejected instrument had, *e.g.*, absolutely prohibited banks of issue and incurred on that account great hostility among the commercial classes in the eastern portion of the territory.<sup>8</sup> The second convention, wishing to conciliate this element and at the same time avoid alienating the settlers of the interior and western portions who were opposed to banks of issue, decided to leave the whole question to future plebiscites, authorized the legislature to submit at any general election a

<sup>1</sup> Among others were the large size of the legislature, the limiting of salaries, provision as to exemptions, rights of married women, etc. Tenny and Atwood, "Fathers of Wisconsin," 386-388.

<sup>2</sup> *Id.* 388.

<sup>3</sup> *Id.* 19.

<sup>4</sup> *Id.* 367.

<sup>5</sup> *Id.* 331.

<sup>6</sup> Art. XII, sec. 2; Poore, II, 2040.

<sup>7</sup> Art. XII, sec. 1; Poore, II, 2040.

<sup>8</sup> Tenny and Atwood, "Fathers of Wisconsin," 387, 388, note.

proposal to charter banks, and prohibited all legislation on the subject unless it should receive the specific assent of the electors.<sup>1</sup> The question of extending the franchise to the negro was similarly disposed of. The convention did not provide for extension, directly, either in its main instrument or in a separate article, but it authorized such extension at any time through legislative enactment ratified by the voters at a general election.<sup>2</sup> It would almost seem as if the framers had been studying the "Frankland Constitution" <sup>3</sup> of 1784 or the referendum of colonial New England.

With hostility thus allayed and opposition disarmed, the new instrument went to the people, and on March 13, 1848, it received their assent by a majority larger than that by which its predecessor had been rejected.<sup>4</sup> It thus became the first and, as yet, the only constitution of Wisconsin. As in Massachusetts and Maine, the original instrument, finally adopted after many unsuccessful attempts, has been retained to the present hour, and events have proved there as elsewhere that the most enduring form of an organic law is that which is builded on popular sovereignty and sealed with popular approval.

But although no third constitutional convention has been called in Wisconsin and the original instrument remains, with few substantial changes, popular participation in law-making has continued throughout the state's later history. In 1849, the year following the adoption of the constitution, the legislature exercised its privilege of submitting to the voters for their approval a proposed enactment, granting the franchise to the negro,<sup>5</sup> which received nearly one-third more votes than were cast against it.<sup>6</sup> Beginning with 1876, various amendments <sup>7</sup> to the constitution have been submitted and ratified, none of them radical or fundamental, but such merely as were suggested by new conditions and added experience, and at the 1903 session of the legislature the question of establishing by law the direct primary, long a subject of contention in Wisconsin politics, was disposed of precisely as such questions had been dealt with by the second constitutional convention, viz. referring it to a vote of the people.<sup>8</sup>

<sup>1</sup> Art. XI, sec. 5; Poore, II, 2040.

<sup>2</sup> Art. III, sec. 1; Poore, II, 2030.

<sup>3</sup> See *ante*, Chap. VIII.

<sup>4</sup> The vote was 16,799 to 6384; Tenny and Atwood, 367.

<sup>5</sup> Wisconsin Laws, 1849, Chap. 137.

<sup>6</sup> Gillespie v. Palmer, 20 Wis. 572.

<sup>7</sup> Seven of these had been adopted up to 1877.

<sup>8</sup> Wisconsin Laws, 1903, Chap. 451.

Truly, the civic lessons of pioneer days were well learned in the Badger state. No commonwealth has been more steadfast in its policy of consulting the people, and none has more reason to be proud of the system of laws and institutions which that policy has fostered.

Thus, by the middle of the nineteenth century, popular ratification had become established in all of the states of the Northwest Territory. New Englander and Southron, mingling and colliding, had produced a method of constitution-making, in part original and differing in some respects from either parent system, ever more democratic in tendency, and destined to furnish models for the fundamental codes of great states yet to be formed from the wilderness beyond.

## CHAPTER XVII

### POPULAR RATIFICATION IN THE LOUISIANA PURCHASE

#### *A. Louisiana*

THE region known as the Louisiana Purchase includes a number of commonwealths, having a great variety of soil and climate, as well as of population. But all of these have a common origin as regards their subjection to American sovereignty, and the connection of their constitutional and legal history has been closer than is commonly supposed. The first state to be formed from this region was Louisiana. Its government had always been autocratic, and there was little, if any, improvement in this regard upon its acquisition by the United States. Indeed, so extreme was the power vested in the governor and council, appointed by the American President, that a meeting of the inhabitants was held soon after the session to agitate for a modification, and a committee was sent to Washington to intercede with Congress to this end.<sup>1</sup> Although repeated efforts for statehood were made, it was not until 1811 that Congress could be induced to pass an enabling act, and this measure, when finally adopted, was like others of that period in leaving it to a convention "to form a constitution and state government for the people."<sup>2</sup> Delegates elected to such a convention assembled at New Orleans on November 4, 1811. The first question before it was the expediency of forming a state government at all, and this was the occasion of some debate, although the majority in favor of such a course was large.<sup>3</sup> In framing a constitution it was natural that this body should take as its model the latest instrument which had been framed in that section of the country, and which, in this instance, happened to be the second con-

<sup>1</sup> Martin, "History of Louisiana," 325.

<sup>2</sup> Enabling Act, sec. 3; Poore, "Charters and Constitutions," I, 699.

<sup>3</sup> Gayarre, "History of Louisiana," IV, 272.

stitution of Kentucky,<sup>1</sup> which, as we have seen, had been adopted in 1799. Imitation of this instrument is particularly noticeable in the amendment clause, which was taken directly therefrom.<sup>2</sup> This first Louisiana constitution was not a democratic document. It imposed a property qualification both for the franchise and for office holding, and empowered the governor to appoint not only judges but local ministerial officers.<sup>3</sup> It was, of course, proclaimed without submission as the enabling act intended it should be, though it is not likely that the action in this regard would have been different without such a requirement at that period and in a community where so large a part of the population was of Latin origin and so little accustomed to direct participation in the affairs of government. It was something that the first constitution of such a community should have provided for consulting the people with reference to the calling of a convention.

Almost a generation elapsed before the movement was started which displaced this constitution, proclaimed in 1812. But in 1843 the legislature passed an act providing for a convention "for the purpose of readopting, amending or changing the constitution of the state."<sup>4</sup> The democratic movement had by this time reached Louisiana,<sup>5</sup> as was evident in the work of the body which met in pursuance of this act. It abolished the property qualification for the franchise and for office holding and increased the number of elective offices.<sup>6</sup> But in submitting amendments it required the concurrence of three-fifths of the members of the first legislature instead of a simple majority, as in the preceding instrument.<sup>7</sup> The most significant feature of this constitution, however, was its express requirement of submission<sup>8</sup> notwithstanding the constituent act would, as we have seen, have authorized it to be proclaimed. It shows that the people of Louisiana had meanwhile been learning from the southern states to the east of them.

<sup>1</sup> "Those who prepared the first form of a constitution submitted to the convention took the constitution of Kentucky for a model." — Martin, "History of Louisiana," 354.

<sup>2</sup> Art. VII; Poore, "Charters and Constitutions," I, 707.

<sup>3</sup> Arts. II, III; Poore, I, 701, 703. <sup>4</sup> Louisiana Acts, 1843 (New Orleans, 1843), 31.

<sup>5</sup> Gayarre, "History of Louisiana," 668.

<sup>6</sup> Art. X, 83.

<sup>7</sup> Title VIII; Poore, "Charters and Constitutions," I, 723. This clause introduced the requirement of publication of the proposed amendment in French and English.

<sup>8</sup> Arts. 150-152; Poore, "Charters and Constitutions," I, 724, 725.

The second constitution was ratified in November, 1845, but it was not long in force. It was displaced in 1852 by another, likewise ratified, which modernized the amendment clause by dispensing with the second legislative approval.<sup>1</sup> The ordinance of secession was not submitted, but a new constitution, framed in 1864 under the auspices of the military government, authorized amendments to be submitted by a simple majority of one legislature,<sup>2</sup> and was itself ratified by a small fraction of the voters,<sup>3</sup> but was not recognized by the Federal government. The reconstruction instrument of 1868<sup>4</sup> was ratified by the people, as was also the one which displaced it in 1879, and Louisiana continued under a popular constitution until almost the close of the nineteenth century, when, as we shall later see, it joined the reactionary movement and proclaimed a constitution.

### *B. Missouri*

The enabling act for Missouri was almost precisely like the one passed for Louisiana in precluding the submission of the state's constitution.<sup>5</sup> The convention authorized by it and which met at St. Louis in 1820 could not have been expected to submit its work to the voters.<sup>6</sup> But the terms of the enabling act hardly justified the convention in failing to provide any system of popular ratification by amendments and in adopting the mode of alteration by the legislature only,<sup>7</sup> especially since Louisiana, a decade before, and Kentucky, a generation earlier, had each furnished a better model. The example of Louisiana seems to have been more effective a score of years later, for it was in the same year that the latter state took steps to inaugurate a new constitution that the legislature of Missouri passed an act "for taking the sense of the people . . . upon the expediency

<sup>1</sup> Title IX; Poore, II, 737.    <sup>2</sup> Title XII; Poore, I, 753.    <sup>3</sup> 6836 against 1566.

<sup>4</sup> This restored the two-thirds requirement for submitting amendments. Title IX; Poore, I, 769.

<sup>5</sup> Missouri Enabling Act, sec. 4; Poore, II, 1103.

<sup>6</sup> "The constitution, as adopted, was not submitted to a vote of the people for ratification, but took effect of its own motion." — Carr, "Missouri" (American Commonwealths, Boston and New York, 1888), 151. Cf. Jameson, "Constitutional Conventions," 652; Oberholtzer, "The Referendum in America," 112, note. Mr. Poore ("Charters and Constitutions," 1104, note) is evidently in error in saying that it was submitted.

<sup>7</sup> Art. XII; Poore, II, 1114.

of calling a convention to amend, alter or make a new constitution."<sup>1</sup> This act further provided for a popular vote on the instrument to be framed, and required the governor to submit this vote to the legislature, which was directed to declare the instrument in force if it should appear to have received "a majority of all the votes given."<sup>2</sup> The work of the convention thus provided for was submitted to the people and rejected.<sup>3</sup> But in 1861 a convention assembled which framed certain amendments to the constitution of 1820, and submitted them to the people.<sup>4</sup> An entire new constitution was ratified by the electors in 1865. It provided for amendments to be submitted by a majority of one legislature, and for the calling of a convention upon a proposal similarly submitted and ratified by a majority of those voting thereon.<sup>5</sup>

The convention which framed this instrument was in control of the Union party, and it assumed the power to limit the electorate to which its work should be submitted to those who could take the oath of loyalty to the Federal government.<sup>6</sup> This, of course, was mere legislation on the part of the convention, but the power to enact it was afterwards confirmed by the Supreme Court in a prosecution for taking a false oath in order to vote at this election.<sup>7</sup> This ruling appears to be in conflict with that made by the Supreme Court of Pennsylvania a few years later,<sup>8</sup> and it was the occasion for the announcement, probably for the last time in Missouri, of the "representation" theory, which was expressed in these words:

"The convention might (if it had been deemed proper to do so) have declared the constitution framed by it in full force and effect without making provision for its submission to the voters of the State."<sup>9</sup>

The present constitution of Missouri, framed in 1875, was ratified by the people and retains the modern amendment feature of its predecessor.<sup>10</sup>

<sup>1</sup> Missouri Laws, 1843 (Jefferson City, 1843), 26, sec. 1.

<sup>2</sup> Id. 28, sec. 15.

<sup>3</sup> Jameson, "Constitutional Conventions," 652.

<sup>4</sup> Poore, II, 1123, 1124. But this action was revoked. Id. 1130.

<sup>5</sup> Art. XII; Poore, II, 1155.

<sup>6</sup> Art. XIII, sec. 6; Poore, "Charters and Constitutions," II, 1156.

<sup>7</sup> State v. Neal, 42 Mo. 119.

<sup>8</sup> Wells v. Bain, 75 Pa. St. 39; Wood's Appeal, 75 Pa. St. 59.

<sup>9</sup> State v. Neal, 42 Mo. 123. "This was *obiter*," says Judge Cooley, in his "Constitutional Limitations" (5th Ed.), 42.

<sup>10</sup> Art. XV; Poore, II, 1195. The vote on ratification was 90,600 as against 14,362.



*C. Arkansas*

The third state admitted from the Louisiana Purchase was Arkansas. Like its two predecessors, it entered the Union with a constitution which had not been submitted to the people. Not only was this the last permanent state constitution to be so adopted, prior to the reconstruction era, but, apparently following the example of her northern neighbor, Arkansas even retained the eighteenth-century method of amendment by the legislature.<sup>1</sup>

The events immediately preceding the Civil War seem to have produced something of a change of method. On January 16, 1861, the legislature submitted to the people the question of calling a convention to consider the issue of separating from the Union. The proposal was approved, though the vote in its favor was no more than a bare majority of those participating in the presidential election held in the state a few months previously. The convention passed an ordinance providing for a vote of the people in the ensuing August on the question whether they desired secession or "coöperation" with the existing Union. Some three months before this date arrived, however, the convention took the matter into its own hands and enacted a secession ordinance.<sup>2</sup>

During the last year of the war a new constitution was framed and submitted to the electors of Arkansas, but it retained, strangely enough, the plan of legislative amendment.<sup>3</sup> In 1868, however, another instrument similarly submitted and ratified in order to meet the requirements of the reconstruction acts, embodied the Pennsylvania plan of referring amendments by a majority vote of two successive legislatures.<sup>4</sup> The present constitution, framed and submitted in 1874, dispenses with the approval of the second legislature.<sup>5</sup> The people of the state have recently been employing the direct primary, particularly in the nomination of United States senators, and, despite the anomalies of its early history, the principle of popular participation seems now to be firmly established in the commonwealth.

<sup>1</sup> Ark. Constitution, 1836, Art. IV, sec. 35; Poore, "Charters and Constitutions," I, 108.

<sup>2</sup> Tenney, "Military and Naval History of the Rebellion," 40, 41.

<sup>3</sup> Ark. Const., 1864, Art. IV, sec. 32; Poore, I, 126.

<sup>4</sup> Ark. Const., 1868, Art. XIII; Poore, I, 149.

<sup>5</sup> Ark. Const., 1874, Art. XIX, sec. 22; Poore, I, 180.

*D. Iowa*

The first state carved out of the Louisiana purchase in which the people were directly consulted regarding their fundamental laws was Iowa. The reasons for this are apparent when we examine the state's institutional beginnings, which resemble strongly those of the communities of the South whence came the popular constitution of that region.<sup>1</sup> The first attempt at organized government and law-making within the limits of the present state of Iowa seems to have been made by the lead-miners in the vicinity of Dubuque in 1830. These men were mostly from Illinois, and the mines which they desired to work were situated on Indian land belonging to the Sac and Fox tribe whose rights the United States government was protecting with military force.<sup>2</sup> But looking forward to the time when this land should be thrown open to settlement, and being without the pale of civil authority, either state or federal, they repeated the experiment, so often witnessed in our history, of improvising political institutions fitted to their needs. "Assembled around an old cotton-wood log, stranded on an island,"<sup>3</sup> they held a folkmoot, and adopted the following code of laws which a committee appointed by them had framed, and which, though brief, met the conditions which were then most important to them:—

"We, a committee, having been chosen to draft certain rules and regulations by which we, as miners, will be governed, and, having duly considered the subject, do unanimously agree that we will be governed by the regulations on the east side of the Mississippi river, with the following exceptions, to wit:

"Article 1. That each and every man shall hold two hundred square yards of ground, working said ground one day in six.

"Article 2. We further agree that there shall be chosen, by a majority of the miners present, a person who shall hold this article and grant letters of arbitration on application having been made, and that said letters of arbitration shall be obligatory on the parties concerned so applying."<sup>4</sup>

<sup>1</sup> "The conditions which led to its (the claim association's) organization among the early settlers in Iowa, are in general the same as those which have given rise to like organizations from the days of the self-governing commonwealths of Watauga, Cumberland, and Transylvania down to the settlement of Oklahoma."—Shambaugh, "Constitutions and Records of the Claim Association of Johnson County, Iowa" (Iowa City, 1894), Introduction, xii.

<sup>2</sup> Macy, "Institutional Beginnings in a Western State," Johns Hopkins University Studies, II, 348.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

*The Claim Associations*

The next efforts at constitution-making were those of the claim associations, of which that of Johnson County seems to have been the most successful.<sup>1</sup> An act of the territorial legislature had located the capital at Iowa City, the county seat of this county, and the sudden influx of immigrants due to this fact, as well as the unreliable condition of the land laws, made it imperative that the settlers and "squatters" already on the ground should organize for self-protection.<sup>2</sup> Several meetings for this purpose were held early in 1839, and on March 9 of that year, the assembled settlers adopted their constitution and laws for the government of the citizens of Johnson County in making and holding claims. This instrument has been pronounced<sup>3</sup> "an exceptionally perfect one" among its class. It was, of course, mainly devoted to the prime purpose of protecting the settlers' claims, and it contained elaborate provisions for the maintenance and procedure of land courts, the adjustment of boundary disputes, and the prevention of "claim jumping." But its chief interest for us lies in its popular character. The meeting which adopted it is said to have included "nearly every settler in the county"<sup>4</sup> and these all signed<sup>5</sup> the document reciting therein that "for the faithful observance and mantanance [*sic*] of all the foregoing laws we mutually pledge our honours and subscribe our names hereunto."<sup>6</sup> Future membership in the association was provided for as follows:<sup>7</sup> —

"Any male, white person over the age of eighteen can become a member of this association by signing the laws, rules and regulations governing the association. No member of the association shall have the privilege of voting on a question to change any article of the constitution or laws of the association unless he is a resident citizen of the county and a claimholder."

Future constitutional changes were thus regulated: —

"Any law or article of the constitution of this association may be altered at the semi-annual meetings and at no other meetings provided however, that three fifths of the members presant who are resident citizens of the county and actual

<sup>1</sup> Shambaugh, "Constitution and Records of Claim Association of Johnson County," xiv.

<sup>2</sup> Id. xiv, xviii.

<sup>3</sup> Id. 3, where it is printed in full.

<sup>4</sup> Id. xiv.

<sup>5</sup> The list of signatures fills about four printed pages of two columns each, though this may have included those who signed after adoption.

<sup>6</sup> Shambaugh, "Constitution and Records of Claim Association of Johnson County," 12.

<sup>7</sup> Id. 9.

claim holders shall be in favour of such change or amendment, *except that section fixing the quantity of land that every member is entitled to hold by claim and that section shall remain unaltered.*"<sup>1</sup>

Here, then, in the very political beginnings of Iowa we find the principle of popular assent and participation recognized throughout.

### *Constitution-making*

Early in the legislative history of the new commonwealth, these pioneer experiments in popular law-making bore fruit. The result was doubtless hastened by the corresponding movement in Wisconsin, of which, for a time, Iowa formed a part. At the session of the legislature, held in 1840, an act was passed "to provide for the expression of the opinion of the people of the territory of Iowa as to taking preparatory steps for their admission into the Union."<sup>2</sup> It provided for opening a poll in every electoral precinct of the territory<sup>3</sup> and for receiving ballots from all qualified voters for territorial delegates, labelled "convention" or "no convention."<sup>4</sup> The result of this vote, which was taken in August, 1840, was the rejection of the proposal by a majority of more than three to one.<sup>5</sup> The settlers feared increased burdens of taxation as a result of statehood,<sup>6</sup> and though there was some disappointment over the result, the people were recognized as the proper and final arbiters, and their decision was accepted.<sup>7</sup> In 1842, the statehood project was revived in the legislature. This time the act<sup>8</sup> provided not only for taking the sense of the voters, but also for a convention in case the proposal should be adopted, and further established the practice of consulting the people by the following clause:<sup>9</sup>—

"That when a constitution and form of state government shall have been adopted by said convention they shall cause the same to be published in all the newspapers in this territory and at the next general election for members of the

<sup>1</sup> Shambaugh, Id. 9.

<sup>2</sup> Iowa Laws, 1840 (Burlington, 1840), Chap. XXXIII.

<sup>3</sup> Id. sec. 1.

<sup>4</sup> Id. secs. 2, 3.

<sup>5</sup> The exact figures were 2907 to 937. Iowa Standard, I, No. 6, reprinted in Shambaugh, "Documentary Material relating to the History of Iowa" (Iowa City, 1897), I, 137.

<sup>6</sup> Shambaugh, Id. 133.

<sup>7</sup> "The sentiments of the people of the territory thus indicated will necessarily preclude all further legislation on the subject at the present session. The people have by their votes expressed their preference for a territorial government for the time being." Governor's message to ensuing Legislature, House Journal 113. Reprinted in Shambaugh, Id. 136.

<sup>8</sup> Iowa Laws, 1842, Chap. LXXXIV, 70.

<sup>9</sup> Id. sec. 8, p. 70.

council and House of Representatives after the formation of a constitution and state government by said convention, the electors of said territory, who are qualified to vote for members of the legislature at said general election shall be, and they are hereby authorized to vote 'for the constitution' or 'against the constitution.'"

But this appeal to the people was likewise unsuccessful, and while the proportion was not so pronounced as at the former submission, each of the seventeen counties returned a majority against the proposal.<sup>1</sup>

In 1844 a third proposal was submitted by an act<sup>2</sup> which, like the preceding, provided for a convention which should refer its work to the electors, who were not required to be residents of the county in which they voted.<sup>3</sup> This proposal was approved by a substantial majority,<sup>4</sup> in April, 1844, and the convention thus provided for met at Iowa City in the following October.

In the deliberations of this body<sup>5</sup> little attention seems to have been paid to the question of submission. That was settled by the constituent act and by the precedents which had been established even at that early day, and in that pioneer community. The instrument framed by the convention<sup>6</sup> provided for submitting amendments which had been approved by two successive general assemblies<sup>7</sup> and also for submitting proposals for a convention by a two-thirds vote of any assembly, though the proposal of the same amendment oftener than once in six years was forbidden.

But this instrument of 1844 was rejected by the people,<sup>8</sup> and a lively debate was precipitated in the next legislature as to whether the same instrument should be resubmitted.<sup>9</sup> The advocates of this plan finally prevailed<sup>10</sup> and the proposed constitution went once more to the people, only to be rejected again, though by a smaller majority.<sup>11</sup> The legislature now took the question into its own hands. Without

<sup>1</sup> Shambaugh, "Documentary Material," etc., I, 141-143.

<sup>2</sup> Iowa Laws, 1844, Chap. IX, 13.

<sup>3</sup> Id. sec. 9.

<sup>4</sup> Shambaugh, "Documentary Material," etc., I, 148, 149. Different estimates of the vote are given, but all show a strong preponderance in favor of the constitution.

<sup>5</sup> See its Debates, edited by Shambaugh (Iowa City, 1900).

<sup>6</sup> Shambaugh, "Documentary Material," etc., Vol. I, No. 6, pp. 150, 173.

<sup>7</sup> A feature retained by the present constitution. Art. X, sec. 1.

<sup>8</sup> The majority against was 996 in a vote of over 13,000. Shambaugh, "Documentary Material," etc., I, 179, 180.

<sup>9</sup> Shambaugh, Debates, 269 *et seq.*

<sup>10</sup> Iowa Laws, 1845, Chap. XIII, 3. The act was vetoed by the Governor but passed again by the necessary two-thirds.

<sup>11</sup> 421 out of about 15,000. Shambaugh, "Documentary Material," etc., I, 184.

submitting a proposal it passed an act<sup>1</sup> calling a convention, and providing for the election of delegates. This body met at Iowa City<sup>2</sup> in May, 1846, and framed an instrument<sup>3</sup> which at last received the assent of the people and remained for more than a decade the fundamental law of Iowa.

This instrument prohibited slavery,<sup>4</sup> but restricted the franchise to white males.<sup>5</sup> It provided for amendment after 1870 through a convention only, to be called by a majority vote of the people on a proposal submitted through an ordinary legislative act.<sup>6</sup> This was the instrument used so extensively by the California convention three years later.<sup>7</sup>

In 1857 the voters ratified a new constitution<sup>8</sup> whose amendment provisions were like those of the instrument of 1844.

### *E. Kansas*

The state of Kansas passed through a memorable experience in constitution-making during its early history; and while the main interest centred in the substance and contents of the constitution rather than in the manner of its establishment, the record of this period nevertheless constitutes an important chapter in the development of the practice of popular participation. The story of Kansas as the battleground of contending factions over the slavery question is a familiar one, and belongs to the domain of general history. Hardly had the territorial government been organized when a movement was started by the free-soil party looking toward the formation of a state government with a constitution reflecting that party's views on the slavery question. Various unofficial meetings held in the territory during the summer of 1855 resulted in the calling of a so-called constitutional convention at Topeka on the 19th of September of that year.<sup>9</sup> This organization met at the time appointed, and has been

<sup>1</sup> Iowa Laws, 1846, Chap. XXXVII, 37.

<sup>2</sup> See its Debates, edited by Shambaugh (Iowa City, 1900).

<sup>3</sup> It is printed in Iowa Laws, 1847, 1. The document which Mr. Poore ("Charters and Constitutions," I, 536) gives as the constitution of 1846, is really that of 1857, the latter being printed twice. The two are nearly alike, as both followed closely the rejected instrument of 1844.

<sup>4</sup> Art. II, sec. 23.

<sup>5</sup> Art. II, sec. 1.

<sup>6</sup> Art. XI, sec. 1.

<sup>7</sup> See *post*, Chap. XVIII.

<sup>8</sup> Poore, "Charters and Constitutions," I, 552.

<sup>9</sup> On the preliminary movement see Holloway, "History of Kansas" (Lafayette, Indiana, 1868), 179 *et seq.* Cf. Spring, "Kansas" (American Commonwealth Series, Boston, 1885), 68 *et seq.*

pronounced "one of the most important bodies of men ever convened in Kansas."<sup>1</sup> The instrument framed by it was of course an anti-slavery document,<sup>2</sup> though not so radical as part of the delegates desired.<sup>3</sup>

The instrument provided for its own ratification by the people and also for the submission of other proposals at the same time,<sup>4</sup> but its provision for future amendment was decidedly antiquated, for it adopted the old Connecticut system requiring submission by a two-thirds vote of two successive legislatures, and prohibited any amendment for the ensuing ten years or more than once in five years thereafter.<sup>5</sup> The election at which this instrument was voted upon seems to have been little more than "a free-soil primary."<sup>6</sup> The vote was 1731 to 46. It was not accepted by Congress, nor generally regarded as valid or regular.<sup>7</sup>

The next move toward a constitution for Kansas was made by the opposing party, and the forms of law were more carefully observed. An act was first passed by the legislature, submitting to the people the question of calling a convention. This time the election was a pro-slavery primary, and the poll was favorable to a convention.<sup>8</sup> Another act was then passed providing for a convention, but containing no requirement that its work should be submitted to the people. Chiefly on the ground of this omission the act was vetoed by the territorial governor, whose message on the question throws an interesting side-light on the state of public opinion as regards the right of the people to participate in constitution-making. *Inter alia* the governor said:—

"The position that a convention can do no wrong, and ought to be invested with sovereign power, and that its constituents have no right to judge of its acts, is extraordinary and untenable.

"The history of State constitutions, with scarcely an exception, will exhibit a uniform and sacred adherence to the salutary rule of popular ratification."<sup>9</sup>

<sup>1</sup> Holloway, "History of Kansas," 194.

<sup>2</sup> See Poore, "Charters and Constitutions," I, 581, 582. Section 6 of Article 1 prohibited slavery, and Section 21 prohibited the indenture of any negro or mulatto.

<sup>3</sup> Holloway, "History of Kansas," 195. The proposal to strike out the word "white" from the constitution was defeated by a vote of 24 to 7, and the franchise was not extended to the negro.

<sup>4</sup> Art. XII, sec. 11; Poore, "Charters and Constitutions," I, 592.

<sup>5</sup> Art. XVI; Poore, "Charters and Constitutions," I, 591.

<sup>6</sup> Spring, "Kansas" (American Commonwealth Series, Boston, 1885), 71.

<sup>7</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 212.

<sup>8</sup> Id. sec. 213.

<sup>9</sup> Kansas Historical Collections, IV, 717. The governor had said in a previous

The constituent act was passed over the governor's veto, delegates were chosen at an election from which the anti-slavery men still held aloof, and the convention met at Lecompton in the autumn of 1857. It framed an instrument which embodied the "social compact" theory<sup>1</sup> of Southern constitutions of several decades previous, expressly legalized the institution of slavery,<sup>2</sup> and excluded free negroes from the state.<sup>3</sup> It provided, however, for submission "to all the free white male inhabitants."<sup>4</sup> Its provision for amendment, which was not to become operative until 1864, was through a convention to be called after taking the sense of the people, but slavery was excluded from the subjects of which it might take cognizance.<sup>5</sup> The clause providing for submission specified two classes of ballots, one of which should be indorsed "constitution with slavery," and the other "constitution with no slavery." The election pursuant to this provision took place in December, 1857, and as the free-soil party took no part, there was an overwhelming majority on the face of the returns in favor of the "constitution with slavery."<sup>6</sup> Meanwhile, however, the legislature controlled by the opposite party convened and repealed the act providing for the convention, and passed one requiring the instrument as a whole to be resubmitted.<sup>7</sup> This time the constitution was rejected by a majority much larger than it had received at the preceding election.<sup>8</sup> In 1858 Congress passed an act in effect again submitting it.<sup>9</sup>

In the same year the legislature called another convention without a previous consultation of the people, and delegates were elected who met first at Mineola, and afterward at Leavenworth. They framed an instrument which omitted the obnoxious provisions regarding slavery and provided for its own ratification by the people,<sup>10</sup> but required a three-fifths vote of the legislature to submit either an amendment or a proposal for a convention.<sup>11</sup> It likewise adopted the New Hampshire system of periodical consultation as modified by New

message: "Direct popular vote is necessary to give it [the constitution] sanction and effect." *Id.* 719.

<sup>1</sup> Bill of Rights, sec. 1; Poore, "Charters and Constitutions," I, 609.

<sup>2</sup> Bill of Rights, sec. 23; Poore, "Charters and Constitutions," I, 610.

<sup>3</sup> Sched. 7; Poore, "Charters and Constitutions," I, 611.

<sup>4</sup> Sched. 14; Poore, "Charters and Constitutions," I, 612.

<sup>5</sup> *Id.*

<sup>6</sup> The vote was 6226 to 569.

<sup>7</sup> Holloway, "History of Kansas," 474 *et seq.*

<sup>8</sup> The vote was 10,226 to 138.

<sup>9</sup> Greeley, "American Conflict," I, 250.

<sup>10</sup> Sched. sec. 5; Poore, "Charters and Constitutions," I, 628.

<sup>11</sup> Art. XVIII; Poore, "Charters and Constitutions," I, 627.



York, and fixed the period at ten years.<sup>1</sup> The instrument framed by this convention received a majority of more than three to one on the face of the returns.<sup>2</sup> But it was apparent that the participation of the electors was not general and Congress refused to accept the instrument because of the sparseness of the territory's population.<sup>3</sup> In the following year, however, the legislature once more submitted the question of calling a convention, and the poll was favorable.<sup>4</sup> Pursuant to a subsequent act providing for a fourth convention, delegates assembled at Wyandotte in June, 1859, and framed the constitution under which Kansas was at last admitted into the Union. It was modelled on the Topeka instrument of four years previous.<sup>5</sup> Its treatment of the slavery question was similar, but in providing for amendment it retained the two-thirds requirement of the Leavenworth constitution relative to both amendments and conventions, and omitted the clause providing for a periodical consultation of the people.

Thus at last the state of Kansas secured a permanent, fundamental code, for the Wyandotte constitution as a whole has never been displaced, though numerous amendments have been added.<sup>6</sup> Indeed, the intensity of the struggles and the importance of the issues involved seem to have contributed in Kansas, as they had during the revolutionary period in Massachusetts, to the permanence of the instrument which was finally evolved.

### *F. Nebraska*

The commonwealth of Nebraska entered upon the stage of history after the movement for popular ratification had been elsewhere mostly completed. There are, however, some features of its early history which throw an interesting side-light on the movement by reproducing the experience of other communities.

The constitutional beginnings of Nebraska are signalized by the organization of society on a basis independent of any formal existing government. When the first settlers entered the territory there was

<sup>1</sup> Art. XVIII; Poore, "Charters and Constitutions," I, 627.

<sup>2</sup> The vote was 4346 to 1257.

<sup>3</sup> Jameson, "Constitutional Conventions" (4th Ed., Chicago, 1887), sec. 216.

<sup>4</sup> The vote was 5306 to 1425. <sup>5</sup> See Holloway, "History of Kansas," 196.

<sup>6</sup> See Poore, "Charters and Constitutions," I, 645.

indeed no government in operation. The Federal officers had not yet arrived, and no laws were in force except the acts of Congress which had mostly a general application.

In this situation the Nebraska settlers did what those of early Tennessee and New England had, with such important consequences, done before them. They formed a government of their own, and in the autumn of 1854 adopted a compact which like the instruments of those already referred to, acquired validity from the assent and subscription of all. As land was then the chief item of wealth in the territory, the animating purpose of this movement was the protection of land claims, but it assumed the form of a genuine government, including the establishment of a judicial system. It provided *inter alia* that

"any person to receive the benefit of the foregoing regulations must subscribe thereto . . . and is in honor bound when called on to assist the marshal in the performance of his duties."<sup>1</sup>

From the contemporary newspaper accounts it appears that numerous disputed titles were adjudicated, that the decisions of the arbitration committee were respected and enforced, and that the association continued to exercise this most important function of a government for a considerable period.<sup>2</sup>

This Belleview association was not, however, the only one of its kind in the territory. In the then small hamlet, a few miles to the north, a similar organization was formed, known as the "Omaha Claim Club." It does not seem to have left a compact, like the former, and its record is marred by an abuse of power and a perversion of its legitimate purpose to selfish and oppressive ends.<sup>3</sup> But the two organizations well illustrate the tendency of frontier communities to revert to archaic political, as well as other, conditions, and the Belleview compact of 1854 is entitled to a place among the primitive, popular local constitutions.

The precedent of popular ratification thus established has never been departed from in Nebraska. Five years after the adoption of the Belleview compact and nearly a decade before the state's admis-

<sup>1</sup> From the *Nebraska Palladium*, Belleview, September, 1854; reprinted in *Omaha Mercury* for May 10, 1901.

<sup>2</sup> Id.

<sup>3</sup> See an account of its operations in *Baker v. Morton*, 12 Wallace (U.S.) 150; *Brown v. Pierce*, 7 Id. 205. Also in the local histories: Sorensen, "History of Omaha" (1889); Savage and Bell, "History of Omaha" (1894). Cf. Bell, "History of Washington County," for accounts of similar associations there.

sion, the territorial legislature passed an act submitting to the people the question of calling a constitutional convention, providing for the election of delegates, and, in case the proposal was adopted, that they should meet at the capital —

"to prepare and frame a constitution for the state of Nebraska, to be submitted to the electors of this territory, for adoption and approval by them. And unless it shall be so submitted, adopted and approved, at an election to be appointed by the constitutional convention, it shall not, for any purpose whatever, be deemed or held to be the act of the people of Nebraska."<sup>1</sup>

It will be seen that the requirement of popular ratification here is much more explicit than in the ordinary constituent act. The proposal, however, was rejected by the voters.<sup>2</sup>

In 1866 the legislature<sup>3</sup> framed a constitution which was submitted to the people and ratified by the narrow majority of one hundred,<sup>4</sup> and in 1871 a convention met and framed an instrument which was rejected.<sup>5</sup>

The present constitution was framed and adopted in 1875 by an overwhelming majority,<sup>6</sup> and it insured the permanence of popular ratification by requiring it for all future constitutional changes.<sup>7</sup>

### G. Other States

The constitutional history of the other states formed from the Louisiana Purchase has not been eventful. Minnesota has never

<sup>1</sup> Laws of the Territory of Nebraska, 1859 (Nebraska City, 1860), 45, 46.

<sup>2</sup> The vote was 2372 to 2094 against the convention. "History of Nebraska" (Chicago, 1882), 120.

<sup>3</sup> A convention had met in Omaha on July 4, 1864, pursuant to an enabling act passed by Congress, but owing to depressed business conditions no instrument was framed, and the convention adjourned *sine die*. See Judge Maxwell's opinion in *State v. Boyd*, 31 Neb. 746, 747.

<sup>4</sup> "History of Nebraska," 128. Judge Crounse in *Brittle v. People*, 2 Neb. 211, says that this instrument "was originally drafted in a lawyer's office by a few self-appointed individuals."

"One was drawn up by a caucus of unofficial citizens, and became the first constitution of Nebraska." — Pavey, "Modern State Constitutions," *Magazine of American History*, XXIII, 153.

<sup>5</sup> The contest was close and the majority only 641. The provision for taxing church property was generally thought to have brought about the result. "History of Nebraska," 144, 145.

<sup>6</sup> The vote was 30,202 to 5474. "History of Nebraska," 150.

<sup>7</sup> Constitution of 1875, Art. XV; Poore, II, 1232, 1233.

displaced its original constitution, framed in 1857 by two separate conventions, representing the different political parties, but which agreed upon the same instrument and submitted it to the people.<sup>1</sup> Its amendment system is one of the most advanced, requiring only a majority vote of one legislature for submission, though specifying two-thirds for recommending to the electors the calling of a convention.<sup>2</sup>

The three states formed from the northwest portion of the Louisiana Purchase and admitted under the enabling act of February 22, 1889, submitted their constitutions pursuant to the requirements of that act.<sup>3</sup> There seems, however, to be little uniformity in their system of amendment. Thus, North Dakota adheres to the Pennsylvania plan of submission by a majority vote of two successive legislatures,<sup>4</sup> while South Dakota, which enjoys the distinction of being the first to adopt the initiative and referendum,<sup>5</sup> has reproduced the Minnesota system for the submission of amendments, except that "a majority of the electors voting thereon" is sufficient.<sup>6</sup> Montana incorporates the clause common to several of the states, requiring the work of future conventions to be submitted.<sup>7</sup>

This, likewise, appears in the Wyoming constitution,<sup>8</sup> framed and ratified in 1889, in advance of the enabling act and accepted by Congress in 1890. That instrument also provides<sup>9</sup> for the submission of amendments and proposals for a convention by a two-thirds vote of a single legislature and their adoption by a majority of the voters.

Washington,<sup>10</sup> admitted under the omnibus act of 1889, and Idaho<sup>11</sup> in advance of admission, in the same year sent their constitutions to the people and expressly required the submission of all future constitutional changes.

The new constitution of Oklahoma, adopted by an overwhelming majority on September 17, 1907, pursuant to the provisions of the enabling act, which, however, required the approval of the President as well as of the people of both constituent territories, provides for

<sup>1</sup> McVey, "The Government of Minnesota" (New York, 1901), 18 *et seq.*

<sup>2</sup> Art. XIV; Poore, II, 1040.

<sup>3</sup> U.S. Stats. at Large, XXVI, Ch. 180, Sec. 8.

<sup>4</sup> Art. XV, sec. 202; North Dakota Revised Codes, 1905, lxxiv.

<sup>5</sup> *Post*, Chap. XXIX.

<sup>6</sup> Art. XXIII; South Dakota Laws, 1890, xlv.

<sup>7</sup> Art. XIX, sec. 8.

<sup>8</sup> Art. XX; Wyoming Session Laws, 1890-1891, 69.

<sup>9</sup> *Id.*

<sup>10</sup> Washington Constitution, Art. XXIII, sec. 8.

<sup>11</sup> Idaho Constitution, Art. XX, sec. 4.

revision by popular vote, and also, and this for the first time in an original constitution, applies the initiative principle to constitutional amendments, so that the people are no longer required to await the action of the legislature nor confined to the clumsy expedient of informal petition, but may demand the submission of amendments as a matter of right.<sup>1</sup>

<sup>1</sup> Oklahoma Constitution, Art. V.

## CHAPTER XVIII

### POPULAR RATIFICATION IN THE STATES OF THE MEXICAN CESSION

#### A. Texas

IN Texas, as in Florida, popular ratification as a part of its public law is older than the state. The convention of delegates which, in 1836, formally declared independence of Mexico, likewise framed a constitution<sup>1</sup> for the "Republic of Texas." But this was not, like the act of separation, left to depend on the mere will of the convention. It was submitted to the people and ratified by them at an election held the same year.<sup>2</sup> On March 1, 1845, Congress passed a resolution for annexing Texas, and one of its conditions was that a constitution should be transmitted to the President, "with proper evidence of its adoption by the people of said Republic of Texas."<sup>3</sup>

A convention assembled on July 4 of the same year and framed a constitution for the new state which contained the following provision:—

"Immediately after the adjournment of this Convention, the President of the Republic shall issue his proclamation, directing the Chief Justices of the several counties of this Republic, and the several chief justices and their associates are hereby required, to cause polls to be opened in their respective counties, at the established precincts, on the second Monday in October next, for the purpose of taking the sense of the people of Texas in regard to the adoption or rejection of this Constitution; and the votes of all persons entitled to vote under the existing laws of this constitution shall be received. Each voter shall express his opinion by declaring by a *viva-voce* vote for 'the constitution accepted,' or 'the constitution rejected,' or some words clearly expressing the intention of the voter."<sup>4</sup>

The instrument thus submitted was adopted by an overwhelming majority.<sup>5</sup>

<sup>1</sup> See its text in Sayles' Texas Statutes (St. Louis, 1888), IV, 154 *et seq.*

<sup>2</sup> Id. 133.

<sup>3</sup> Id. 177-179.

<sup>4</sup> Id. 217, 218; Texas Constitution, 1845, Art. XIII, sec. 5; Poore, II, 1781.

<sup>5</sup> Jameson, "Constitutional Conventions," 654. The vote was 4174 in favor, and 312 against.

In February, 1861, the legislature passed a resolution requiring the ordinance of secession to be submitted,<sup>1</sup> which was done,<sup>2</sup> the result being favorable to adoption, though the vote was but little more than half that cast at the presidential election of the preceding autumn.<sup>3</sup>

The secession constitution of the same year was also submitted to the electors<sup>4</sup> and the same course was followed with regard to the instruments of 1866, 1868, and 1875.<sup>5</sup> The convention of 1868, indeed, attempted to put into force a separate ordinance without submission, but this was declared inoperative by the Supreme Court.<sup>6</sup> And so deeply rooted has become the practice of popular ratification in Texas, that this is one of the states where legislation by constitutional amendment is frequently attempted,<sup>7</sup> and the statutory referendum frequently employed.<sup>8</sup>

### *B. California*

The constitutional beginnings of California antedate the formal organization of the state government and are probably to be found in those popular but unofficial organizations which took the place of regular government when the state was first settled by Americans. Just as in Iowa, where the principal source of wealth and species of property was land, the land associations blazed the path for organized political society, so in California, where the leading industry was mining, the miners' associations and miners' codes performed a similar office. As a recent writer<sup>9</sup> on this subject observes:—

"That army of State-builders who poured out their mighty toil upon the placer mines of the Far West . . . had no sooner pitched their tents beneath the Sierra snow peaks, than they called meetings of 'all the freemen of the camp,' created mining 'districts,' elected officers, clothed them with sufficient authority, and ordained laws under which peace was secured and prosperity reigned for years."

<sup>1</sup> Tenney, "Military and Naval History of the Rebellion," 33.

<sup>2</sup> Sayles, *Texas Statutes* (St. Louis, 1888), IV, 257, 258.

<sup>3</sup> Tenney, "Military and Naval History of the Rebellion," 34.

<sup>4</sup> Jameson, "Constitutional Conventions," 654.

<sup>5</sup> *Id.*

<sup>6</sup> *Quinlan v. R. Co.*, 89 Tex. 356; 34 S.W. Rep. 744.

<sup>7</sup> Oberholtzer, "The Referendum in America" (New York, 1900), 166, 168.

<sup>8</sup> See *post*, Chap. XXIX.

<sup>9</sup> Shinn, "Land Laws of Mining Districts," *Johns Hopkins University Studies*, II, 554. The author further says (556):—

"A volume of two thousand pages would hardly be sufficient to contain the complete laws of all the Mining Districts of the Far West. These laws in their complete

Another manifestation of this capacity on the part of the early Californians for self-government appears in the organization of those popular tribunals which bore so important a part in her history, and especially in that of her metropolis during the early fifties. The most voluminous of her historians has observed:—

“Nothing could have more plainly evidenced the moral feeling that animated the better class of citizens than the Vigilance Committee movement. . . . The lesson of self-help so early learned by the people of California, fixed in their minds the sentiment of supremacy. They were freemen in the broadest sense.”<sup>1</sup>

It was from one of these voluntary and unofficial, but nevertheless popular bodies in the truest sense of the term, that the first demand came in California for “a state constitution to be submitted to the people.” As early as 1848, the year after the discovery of gold, mass meetings were held in various parts of California for the purpose of inaugurating a movement toward a provisional government.<sup>2</sup> In the metropolis, one of the results of this movement was the organization of the San Francisco Legislative Assembly.<sup>3</sup> Congress adjourned in March, 1849, without any formal response to the demand for an organized government which had come from California, and the San Francisco Legislative Assembly voiced the prevailing opinion of Californians when, in the language above quoted, it demanded not only a settled government but a popular constitution.<sup>4</sup> Meanwhile, however, a new representative of American authority had arrived in the person of General Riley, Provisional Governor, and while ignoring the demand of the San Francisco Assembly, which had recommended a constitutional convention to be held at San José in August, the governor himself proceeded on June 3, 1849, to

form are usually concise, well-worded, and clear in meaning; in some cases they were evidently drawn up by lawyers, in other cases by men of good general education, but totally ignorant of law-phrases, and in a third class of cases they are the work of ignorant but practical and much-in-earnest frontiersmen.”

He then proceeds to give examples of some of these codes, provisions as to how claims may be taken and held, the form of notice of the claimant's rights, and the jury or board of arbitrators to determine disputes over claims. The whole is very similar to the instruments discussed above as in vogue among the early Iowa settlers.

<sup>1</sup> Bancroft's Works (San Francisco, 1887), XXXVIII; “Popular Tribunals,” II, 683, 678. This volume is an exhaustive discussion of the “Grand Tribunal” organized in the course of the Vigilance Committee movement in California in 1856.

<sup>2</sup> Hunt, “The Genesis of California's First Constitution,” Johns Hopkins University Studies, XIII, 384.

<sup>3</sup> Id.

<sup>4</sup> Hunt, “Legal Status of California, 1846–1849,” *Annals American Academy*, XII, 402, 403.



call a convention to meet at Monterey, the old Spanish capital, in September.<sup>1</sup> Delegates were elected to this body, which has been called "a unique constitutional convention."<sup>2</sup> The delegates were thrown much upon their own resources, for libraries were unknown, and law books rare in the California of that day.<sup>3</sup> But some of the delegates had copies of the Iowa and New York constitutions which had been framed and submitted only three years before.<sup>4</sup> The governor's proclamation had prescribed that the instrument to be framed by the convention should "be submitted to the people for their ratification,"<sup>5</sup> and there was no discussion of this in the convention. Indeed, it is altogether probable that without such a specification in the governor's document the instrument would have been submitted. Not only the formal demand of the San Francisco Assembly but the whole history of California since the American occupation was favorable to such a plan and would have made any other seem irregular. In providing for future amendments, however, the convention hardly reached the standard of the models which appear to have been most studied. The old Connecticut system of requiring action by two successive legislatures in order to submit amendments, was incorporated, and a majority of two-thirds in each house was required for submitting proposals for a convention.<sup>6</sup>

The ratification of the constitution was practically unanimous.<sup>7</sup> In 1862, a number of amendments were adopted, including one relating to the amendment clause itself, and requiring the submission of all future constitutions.<sup>8</sup> In 1879, an entire new constitution was ratified,<sup>9</sup> and since then California has entered upon a new phase of constitutional development. No state has made such abundant use of its amendment clause, and the fundamental code of the Golden State has been materially, and at the same time easily, modified without the calling of a convention and through the mere submission of proposals and their ratification by the electors.<sup>10</sup>

<sup>1</sup> Browne, "Debates in the Convention" (Washington, 1850), 3-5.

<sup>2</sup> Hunt, "Genesis of California's First Constitution," Johns Hopkins University Studies, XIII, 394.

<sup>6</sup> Art. X; Poore, I, 203.

<sup>3</sup> Id. 395.

<sup>7</sup> The vote was 12,061 against 811.

<sup>4</sup> Id. 413; Browne, "Debates in the Convention," 24. <sup>8</sup> Poore, I, 211.

<sup>5</sup> Browne, "Debates in the Convention," 3.

<sup>6</sup> Jameson, "Constitutional Conventions," 654.

<sup>10</sup> Moffett, "The Constitutional Referendum in California," *Political Science Quarterly*, XIII, 1. The author shows that during a period of a dozen years, twenty-eight amendments were submitted in this manner.

*C. Utah*

The people of this commonwealth appear to have had unusual preparation for the adoption and enjoyment of the system of popular ratification. The church to which practically all of its early, and most of its present, inhabitants belong, seems to have carried farther than any other, in theory at least, the Calvinistic doctrine of "common consent"; and since, as is often remarked, Mormonism is not simply a religious, but an all-embracing social system, the prominence of this doctrine in the polity of the church could hardly have failed to affect the political habits and modes of thought of its adherents.

The ablest of the historians of this church thus describes its application of the principle:—

"First of all let us say that this church organization I have described while ordained of God, cannot subsist without the consent of the people. . . . In the very inception of organization of the church, the Lord taught his servant that the organization he was about to bring forth recognized the right of the people to a voice in its affairs. The principle of common consent was to be a prominent factor in this government, as well as the voice of God. It is true of ecclesiastical, as it is of civil governments, that they derive their just powers from the consent of the governed. And hence it is a law of the church that 'no person is to be ordained to any office in this church where there is a regularly organized branch of the same, without the vote of that church.' And it is further provided that 'all things shall be done by common consent in the church by much prayer and faith.'

"Not only was the consent of the people recognized as an important factor in establishing the church government, but it is also provided that it shall be often consulted by a frequent election of officers on the plan of popular acceptance. Twice annually, at the general conference of the church, the general officers are presented to the people for acceptance. Four times a year, at the quarterly conference held in all the stakes of Zion both the general and stake officers of the church are presented to the people for their vote of confidence and support. Once every year ward conferences are held where a similar vote is taken in support of both local and general officers of the ward.

"This voting is not a formality. There is virtue in it. No man can hold a position in the church longer than he can command the support of the members thereof; for when the people refuse to sustain a man by their vote no power in the church can force him upon the people against their will."<sup>1</sup>

Nevertheless, the first constitution of the proposed state of Deseret, framed by a convention at Salt Lake City in March, 1849,<sup>2</sup> was

<sup>1</sup> Roberts, B. H., "A New Witness for God" (Salt Lake, 1895), 350-352.

<sup>2</sup> This was about six months before the assembling of the first California convention.

apparently not submitted.<sup>1</sup> And the same course appears to have been followed with other proposed constitutions.<sup>2</sup> The present instrument, submitted pursuant to the requirements of the enabling act, was ratified by a pronounced majority,<sup>3</sup> and contains the following clause:—

“No Constitution or amendments adopted by such (future) Convention shall have validity until submitted to, and adopted by, a majority of the electors of the State voting at the next general election.”<sup>4</sup>

Utah was the second State to embody into its constitution the initiative and referendum.<sup>5</sup>

#### *D. Oregon*

The principle of popular ratification in Oregon begins with the earliest organization of civilized society in that region. As early as 1843, a provisional government was formed which appointed a legislative committee, whose function it was to frame laws and report them to the settlers for their approval.<sup>6</sup> An early sojourner in Oregon, speaking of this provisional government shortly after its organization, says:—

“In the spring of 1844 a new Legislative Committee was elected, which embraced two or three lawyers who had arrived in the country the previous fall. This committee passed a vote recommending several important alterations in the organic laws, which were found to be, in their practical operations, somewhat defective. As the people had not yet surrendered their law-making power into the hands of the Legislative Committee, it was necessary to call an election to ascertain the will of the people in relation to the proposed alterations and amendments. This election took place, and resulted in the adoption of the organic laws, with the proposed alterations and amendments, by an overwhelming majority.”<sup>7</sup>

With such a schooling in self-government and popular legislation, it was only natural that the first fundamental code for the state of Oregon should come directly from the people. There was no delaying until Congress should pass an enabling act, but a convention assembled at Salem, in 1857, which framed a constitution providing

<sup>1</sup> Bancroft's Works, "History of Utah" (San Francisco, 1880), XXVI, 440 *et seq.*

<sup>2</sup> *Id.* 664. <sup>3</sup> 31,305 to 7687. Revised Statutes of Utah (1898), 72, note.

<sup>4</sup> Utah Constitution, Art. XXIII, sec. 3.

<sup>5</sup> See *post*, 362.

<sup>6</sup> Gray, "History of Oregon" Chap. XLIII. "Oregon was largely settled by New Englanders," *Yale Law Journal*, XVIII, 40.

<sup>7</sup> Hines, quoted in Gray; see also the latter's "History of Oregon," 425.

expressly for its own submission to the electors,<sup>1</sup> but like California, from which doubtless the provision was taken, authorizing amendments to be submitted only by a majority vote of two successive legislatures.<sup>2</sup> Provisions, both authorizing and prohibiting slavery were likewise submitted, but the constitution prohibited Chinese afterward coming to the state from owning land or mining claims.<sup>3</sup> The instrument as a whole has never been displaced, but the state has recently shown its adherence to early traditions by adopting, through constitutional amendment, the referendum in ordinary legislation,<sup>4</sup> and applying the initiative principle to constitutional changes.<sup>5</sup>

### *E. Other States*

In Colorado the submission of constitutions has been the state's policy from the beginning. As early as 1860 steps were taken toward the formation of an organic law,<sup>6</sup> and in 1864 an instrument was framed and submitted, but rejected. The following year a different instrument was ratified by the people, but the act of admission was vetoed by the President<sup>7</sup> and Colorado remained a territory for another decade. The constitution under which it was finally admitted still remains in force. Its amendment clause, like that of Oregon, is apparently taken from California.<sup>8</sup>

Nevada's constitution, ratified by the people in 1864 pursuant to an act of Congress, after a proposed constitution had been rejected, is also modelled closely in its amending clause on California's first instrument,<sup>9</sup> and this state has likewise adopted the initiative and referendum.<sup>10</sup>

<sup>1</sup> Art. XVIII; Poore, "Charters and Constitutions," II, 1505.

<sup>2</sup> Id. Art. XVII.

<sup>4</sup> See *post*, chap. XXIX, pp. 363, 364.

<sup>3</sup> Id. Art. XV.

<sup>6</sup> Oregon Laws, 1903, 244.

<sup>6</sup> *Magazine of American History*, XXIX, 273.

<sup>7</sup> Jameson, "Constitutional Conventions," 655.

<sup>8</sup> Art. XIX; Poore, "Charters and Constitutions," I, 245.

<sup>9</sup> Art. XVI; Poore, II, 1262.

<sup>10</sup> See *post*, 364, 365.

## CHAPTER XIX

### POPULAR RATIFICATION IN THE FEDERAL GOVERNMENT

WHILE the practice of referring all constitutional changes to the people was becoming part of the public law of the individual states throughout the different sections of the Union, a parallel process was going on in the Federal government. As in many of the states themselves, that idea found slight lodgment in the practice of the federal government at its beginning. Commencing with the Confederation, — for, as Lincoln said, “the Union is much older than the Constitution,”<sup>1</sup> — we find little trace of the notion of consulting the people. In certain states, as we have seen, notably Massachusetts<sup>2</sup> and New Hampshire,<sup>3</sup> the Articles of Confederation were submitted for popular approval, but this was through the action, not of the Federal, but of the state government.

#### *A. The Constitutional Convention*

It has even been declared<sup>4</sup> that the idea of referring the Federal constitution to the people was not suggested in the constitutional convention. But there was more than a suggestion upon more than one occasion and those who made it offered some cogent reasons in its behalf.

On Tuesday, June 5, 1787, the convention considered

“the fifteenth Resolution, for recommending conventions under appointment of the people to ratify the new Constitution, . . . Mr. Madison thought this provision essential. The Articles of Confederation themselves were defective in this respect, resting, in many of the States, on the legislative sanction only. . . . For these reasons, as well as others, he thought it indispensable that the new Consti-

<sup>1</sup> First Inaugural Address, “Abraham Lincoln,” Nicolay and Hay, III, 331.

<sup>2</sup> *Ante*, 168.

<sup>3</sup> *Ante*, 180.

<sup>4</sup> “No proposition seems to have been made in the Federal Convention to submit the plan to the direct vote of the people.” — Borgeaud, “Adoption and Amendment of Constitutions,” 133.

tution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.

"Mr. Gerry observed, that in the Eastern States the Confederation had been sanctioned by the people themselves. He seemed afraid of referring the new system to them. The people in that quarter have at this time the wildest ideas of government in the world. They were for abolishing the Senate in Massachusetts, and giving all the other powers of government to the other branch of the Legislature."<sup>1</sup>

Two weeks later in Committee of the Whole a series of propositions by Mr. Patterson of Pennsylvania was under discussion. Mr. Madison "observed that the plan of Mr. Patterson, . . . was particularly defective in two of its provisions. Its ratification was not to be by the people at large, but by the *Legislatures*."<sup>2</sup>

Again on June 23, the question arose upon a motion of Mr. Ellsworth that the instrument

"be referred to the Legislatures of the States for ratification."

"Col. Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. And he knew of no power in any of the Constitutions . . . that could be competent to this object. Whither, then, must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them."<sup>3</sup>

Mr. Randolph considered it

"worthy of consideration, that some of the States are averse to any change in their Constitution, and will not take the requisite steps, unless expressly called upon to refer the question to the people. . . .

"Mr. Madison thought it clear that the Legislatures were incompetent to the proposed changes. . . . There might, indeed, be some Constitutions within the Union which had given a power to the Legislature to concur in alterations of the Federal compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people."<sup>4</sup>

The motion to refer the draft to state legislatures was defeated,<sup>5</sup> and while the people were not asked to pass directly upon the new instrument it would seem that some of the leading spirits in the convention considered this the sole correct method. And not only so,

<sup>1</sup> Madison, "Journal of the Federal Convention," II, 795, 796.

<sup>2</sup> Id. 897, 898; "Documentary History of the Constitution" (House Documents, 56th Cong. 2d Sess., III, No. 529,) p. 156.

<sup>3</sup> Madison, "Journal of the Federal Convention," II, 1177 *et seq.*; the Madison Papers (Gilpin's Ed., Washington, 1840).

<sup>4</sup> Madison, "Journal," 1179, 1183.

<sup>5</sup> Id. 1184.

but their utterances, quoted above, were used long afterward in Congress as weighty arguments for an important extension of the doctrine of popular ratification in submitting to the people directly amendments to the same constitution.<sup>1</sup>

### *B. The Enabling Acts*

From the convention we must turn to Congress, where at first the idea of consulting the people seemed to find little favor.

The earliest opportunity for dealing with the question came in the admission of new states which had not previously framed constitutions of their own. The first three states added to the Union had formed their governments and adopted their constitutions in advance and nothing was left to be done by Congress except to pass acts of admission.<sup>2</sup> It was not until the second year of the nineteenth century that Congress began to exercise its powers to prescribe the manner of adopting a state constitution, and its first effort in this direction was what is known as the "Enabling Act" for Ohio. It was hardly to be expected of the Congress of that day that it should expressly require the constitution of this new state to be ratified by the people, for at that time popular ratification had actually been employed in less than one-fourth of the states. But this first of "enabling acts" went farther than to omit the requirement: it failed even to *allow* the people to participate directly in making their constitution. The convention provided for by the act was "authorized to form a constitution and state government," or to call another convention which should "form *for* [*sic*] the people of the said state, a constitution and state government,"<sup>3</sup> but no authority was given for seeking the consent of the people "to form a constitution" or asking them to ratify it when formed. Says Dr. Hinsdale:—

"The act did not contain a gleam of what was afterward called 'popular sovereignty.' The Territorial Legislature was wholly ignored. Neither the legislature nor the people themselves were asked to pass upon the question of entering into a State government. The sole function of the electors was to vote for members of the convention, in the manner prescribed by Congress."<sup>4</sup>

<sup>1</sup> Congressional Globe, 36th Cong. 2d Sess. Pt. I, 404, 405. And see *post*, 299.

<sup>2</sup> Such were the acts relating to Kentucky, Vermont, and Tennessee. United States Statutes at Large, I, 189, 191, and 491.

<sup>3</sup> *Id.* II, 174, sec. 5.

<sup>4</sup> "The Old Northwest" (New York, 1888), 319.

This rather autocratic measure was not, however, enacted without opposition, and this, naturally enough, came from New England. In the course of the debate in the House, Representative Griswold of Connecticut said:—

"If gentlemen will first obtain the consent of the Territory in a proper mode, though their population does not amount to sixty thousand, I will consent to their admission into the Union. I am disposed to let them act for themselves—to divide or not divide the Territory into states, as they please; but I am against imposing anything upon them contrary to their will. They are more deeply interested than we are in the establishment of a proper form of government. They, and not we, are to be bound by it. They, then, ought, in its establishment, to act for themselves, and not we for them. I contend that such a measure is extraordinary in this country. I know that it has been practiced in other countries. I know that in Switzerland, and in Holland, the people were told by the Republic of France they had bad Constitutions which required alteration, and that the Republic, with sisterly kindness, without asking their consent, imposed conventions upon them, which formed for them entirely new systems of government; but I trust the same thing will not be done here."<sup>1</sup>

But this measure, repugnant as it was to the growing democratic sentiment for direct popular participation, continued to be the model for Congress during more than a generation. In the same form were passed "enabling acts" for the territory of Orleans (afterward Louisiana)<sup>2</sup> in 1811, for Indiana<sup>3</sup> in 1816, Mississippi<sup>4</sup> in 1817, Illinois<sup>5</sup> in 1818, Alabama<sup>6</sup> in 1819, and Missouri<sup>7</sup> in 1820. In all of these enactments the convention was authorized "*to form for the people*" a constitution.

As in the case of the earlier states, there were some during this period which framed constitutions in advance and were admitted without further direction as to the adoption of these. Such were Maine<sup>8</sup> in 1820, and Michigan<sup>9</sup> and Arkansas<sup>10</sup> in 1836. The latter was the last to be admitted without a popularly ratified constitution, or a requirement thereof. Iowa and Florida, admitted by a single act<sup>11</sup> in 1845, and Texas annexed by joint resolution later in the same year,<sup>12</sup> Wisconsin, whose "enabling act"<sup>13</sup> was passed in 1846, and California<sup>14</sup> in 1850, all submitted their first constitutions to the people, excepting perhaps Florida, whose instrument, however,

<sup>1</sup> Annals of Congress (Washington, 1851), 7th Cong. 1st Sess. Column 1113.

<sup>2</sup> United States Statutes at Large, II, 641.

<sup>3</sup> Id. III, 289.

<sup>4</sup> Id. 489.

<sup>5</sup> Id. V, 49.

<sup>6</sup> Id. 797.

<sup>7</sup> Id. 348.

<sup>8</sup> Id. 548.

<sup>9</sup> Id. 50.

<sup>10</sup> Id. IX, 56.

<sup>11</sup> Id. 428.

<sup>12</sup> Id. 544.

<sup>13</sup> Id. 742.

<sup>14</sup> Id. 452.



required submission. In the Wisconsin act of 1848 there was a slight change in phraseology in that "the people" were "authorized to form a constitution and state government."<sup>1</sup> But it was not until 1857, when the "enabling act" for Minnesota was passed, that popular ratification was expressly required. That statute authorized the convention to "take all necessary steps for the establishment of the said government in conformity with the Federal Constitution, subject to the approval and ratification of the people of the proposed state."<sup>2</sup> The act for the admission of Kansas<sup>3</sup> in the following year prescribed certain questions<sup>4</sup> for submission, and all "enabling acts" passed since 1857 have required that the constitution of the proposed state be submitted to the people.<sup>5</sup> In the states formed during the last half century, therefore, the question whether their first constitutions ought to be submitted, could not have arisen; it was determined in advance by the same authority which enabled them to become states.

During the reconstruction period, a number of Southern states endeavored to put new constitutions in force without a reference to the people. But the policy of requiring popular ratification had now become firmly established on the part of the Federal government, and these unratified reconstruction instruments were invariably denied recognition by Congress, and the seceded states were not permitted to resume their places in the Union until constitutions had been framed and submitted to their electors. The year that saw the adoption of the fifteenth amendment marked also the apparently complete triumph of popular ratification, both in state and Federal governments.

Some apparent exceptions to this policy on the part of the latter in recent years may be accounted for by reason of peculiar conditions. In dealing with Cuba the government wisely refrained from attempting to employ the plan of submission to a people schooled, so far as they were schooled at all, only in the monarchical traditions of Latin Europe. Hence the order of the military government of July

<sup>1</sup> United States Statutes at Large, IX, 56.

<sup>2</sup> Id. XI, 166, sec. 3.

<sup>3</sup> Id. 269.

<sup>4</sup> These were provisions of an ordinance enacted by the Lecompton convention relating to land and taxation, and were required by Congress to be submitted to the people as a condition precedent to admission. Greeley ("American Conflict," I, 250) considers this a resubmission of the Lecompton instrument.

<sup>5</sup> See Borgeaud, "Adoption and Amendment of Constitutions," 177.

25, 1900, like the enabling act for Ohio nearly a century previous, authorized an election and meeting of delegates to a convention "to frame and adopt a constitution for the people of Cuba" and when the convention assembled the military governor in addressing it said: "It will be your duty, first, to frame and adopt a constitution for Cuba."<sup>1</sup>

In the omnibus enabling act,<sup>2</sup> relating to the four remaining territories of the Southwest, Congress has shown something of a disposition to prescribe in part the subject-matter of constitutions for the proposed states. Thus the constitution of Oklahoma was required, *inter alia*, to prohibit the liquor traffic in the former Indian Territory for a period of twenty-one years and to provide a system of free non-sectarian schools conducted in English.<sup>3</sup> But these requirements may mostly be justified by considerations of public policy and peculiar local conditions, — such as the existence of a large Indian population.<sup>4</sup>

On the other hand, in providing for the admission of Arizona and New Mexico, instead of arbitrarily combining them into one state as it might have done and was urged to do, Congress left it entirely to the electors of the two territories to say whether they should continue in their existing status or enter the Union as one.<sup>5</sup> This was a privilege never before accorded to the inhabitants of a territory and it is surely significant that such an extension of the doctrine of popular sovereignty should mark the closing chapter in the notable history of continental state-making in America.

### C. Miscellaneous Measures

Meanwhile the plan of appealing to the people was being tried by Congress in other measures than enabling acts. As early as 1843 an act<sup>6</sup> was passed authorizing the legislatures of certain states to

<sup>1</sup> Magoon, "The War Department Administration of Civil Government," *Scribner's Magazine*, XXXIV, 94.

<sup>2</sup> United States Statutes at Large, XXXIV, Pt. I, 267.

<sup>3</sup> *Id.* sec. 3.

<sup>4</sup> The first-named requirement was clearly not regarded as objectionable since a provision for "state wide prohibition" as a part of the constitution, though separately submitted, was adopted by an overwhelming majority.

<sup>5</sup> United States Statutes at Large, XXXIV, Pt. I, 278, sec. 24.

<sup>6</sup> *Id.* V, 600.

provide for the sale of lands granted by the Federal government for the support of schools, but it was carefully stipulated that

"said land, or any part thereof, shall in no wise be sold without the consent of the inhabitants of such township or district,<sup>1</sup> to be obtained in such manner as the Legislatures of said States shall by law direct."

Three years later Congress provided<sup>2</sup> for the retrocession to Virginia of the county and town of Alexandria which had formed part of the District of Columbia, but it was declared therein<sup>3</sup>

"That this act shall not be in force until after the assent of the people of the county and town of Alexandria shall be given to it."

And elaborate provision is made for holding an election to decide the question.

The anti-slavery struggle brought some significant recognition of the referendum principle, mainly, strange to say, at the instance of those opposed to the agitation.<sup>4</sup>

The famous Kansas-Nebraska bill as reported to Congress in December, 1853, provided<sup>5</sup>

"That all questions pertaining to Slavery in the Territories, and in the new states to be formed therefrom, are to be left to the decision of the people residing therein, through their appropriate representatives."<sup>6</sup>

This was Senator Douglas's historic doctrine of "squatter sovereignty," and whatever its *raison d'être*, it marks an advance

<sup>1</sup> I.e. in which schools were located.

<sup>2</sup> United States Statutes at Large, IX, 35.

<sup>3</sup> Id. sec. 4. It is worthy of note that this language is precisely similar to that used in acts which were held void as an attempted delegation of legislative power in *Rice v. Foster*, 4 Harr. (Del.) 492; *Parker v. Com.* 6 Pa. St. 507; 47 Am. Dec. 480, and *Barto v. Himrod*, 8 N.Y. 483, and that by the Federal Constitution (Art. I, sec. 1) "all legislative powers" are vested in Congress. The question seems never to have been raised, however, regarding the act above quoted.

<sup>4</sup> The Republican platforms of 1856 (Greeley, "The American Conflict," I, 247) and 1860 (Id. 320) denied the "authority of Congress, of a Territorial Legislature, or of any individuals to give legal existence to Slavery in any Territory." At the same time the platform of 1856 asserted Congress's "sovereign power over the Territories" and demanded that it prohibit therein "those twin relics of barbarism, Polygamy and Slavery" (Id. 247).

<sup>5</sup> Sec. 2(1). See Congressional Globe, XXVIII, Pt. I, 222; Greeley, "The American Conflict," I, 228, 229.

<sup>6</sup> The same language had been used in Douglas's committee report for which the above was a substitute. United States Statutes at Large, X, 289, sec. 32; Greeley, "The American Conflict," I, 250.

in the phraseology of congressional measures. As passed it was declared to be

"the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution."<sup>1</sup>

On the very eve of the Civil War,<sup>2</sup> Senator Crittenden of Kentucky offered in the Senate a resolution,<sup>3</sup>

"That provision ought to be made by law without delay for taking the sense of the people and submitting to their vote the following resolutions<sup>4</sup> as the basis for a final and permanent settlement of those disputes that now disturb the peace of the country and threaten the existence of the Union."

During the pendency of this measure Senator Bigler of Pennsylvania introduced an auxiliary bill,<sup>5</sup> prescribing the mode in which the "sense of the people" upon the proposed amendments should be taken, and providing that it should be in the same manner and by the same officers as at the then recent presidential election.<sup>6</sup> In the course of the prolonged and exhaustive debate on the resolution there was not a little discussion which revealed the advanced position of certain statesmen of the period as regards the referendum principle. Senator Bigler in explaining his measure said:—

"It is not an attempt to interfere with the rights of the people but simply to consult the power which made the Constitution and constitutes this body and the other House,—the people, the source of all political power. The proposition is to take their will in advance of any action here."<sup>7</sup>

Senator Simmons of Rhode Island referred to the remarks of Senator Mason of Virginia as follows:—

"He said he was against letting the people vote on these resolutions. His distinguished ancestor said he held it of the first importance that this Government should rest on the will of the people. . . . I have as abiding faith in them now as the fathers had when they made this Constitution and how did they come out? Look at your own seventy years' experience under this constitution. Did they

<sup>1</sup> United States Statutes at Large, X, 289, sec. 32.

<sup>2</sup> January 3, 1861.

<sup>3</sup> Congressional Globe, 36th Cong. 2d Sess. Pt. I, 237.

<sup>4</sup> These were proposals of amendments to the Federal Constitution embodying a compromise plan for the settlement of the slavery question. Id. 114.

<sup>5</sup> Id. 351.

<sup>6</sup> Id. 405.

<sup>7</sup> Id. 352.

trust the people in vain? . . . If I read these resolutions aright these amendments are to be adopted if they are approved of by the people of three fourths of the States."<sup>1</sup>

The resolutions came to a vote and were rejected by a majority of one<sup>2</sup> a little more than a month preceding the bombardment of Fort Sumter. What a chain of catastrophes might have been averted if the extremists of both sections could have been persuaded to accept and abide by the simple expedient of "taking the sense of the people"!

<sup>1</sup> Congressional Globe, 36th Cong. 2d Sess. Pt. I, 405.

<sup>2</sup> Id. II, 1405.

## II. RETROGRESSION

### CHAPTER XX

#### MISSISSIPPI

POLITICAL conditions peculiar to the South are, in the main, probably responsible for a movement during this period counter to the tendency which was so marked in the preceding one. The adoption of the fifteenth amendment to the Federal Constitution, and the enfranchisement of the negro, were met by various devices tending to render them inoperative, but were more or less unsatisfactory to their authors. The opponents of negro suffrage finally adopted the plan of an educational or hereditary test, incorporated into the state constitution,<sup>1</sup> but so framed as not to be in conflict with the reconstruction amendments to the Federal Constitution. To effect this it was necessary to change the existing state constitutions in such a way as to avoid the opposition of those whose electoral privileges would be abridged or taken away thereby.

#### *A. The Movement Initiated*

The plan was first inaugurated in Mississippi and, as this state is the pioneer in a political movement of far-reaching importance generally, and of direct bearing upon the subject of this treatise, we

<sup>1</sup> Two classes of provisions were finally devised: (1) The "understanding clause." This required the voter to be one who, in the opinion of the election officer, "understands" the constitution when read to him or reading it to the officer. This clause was ultimately adopted in Mississippi (1890), South Carolina (1895), Alabama (1900), and Virginia (1902). (2) The "hereditary clause." This provided that the voter must be, or descended from, one entitled to vote on a certain date, the latter being fixed at a time antedating the enfranchisement of the Negro. This clause was ultimately adopted in Louisiana (1898), North Carolina (1900), Alabama (1901), and Virginia (1902). See *Review of Reviews*, XXV, 716.

will be justified in dwelling at some length on its constitutional history, and especially on the work of its last constitutional convention.

The constitution of the state, adopted in 1868, provided that "no property nor educational qualification shall ever be required for any person to become an elector,"<sup>1</sup> and this was further safeguarded by a clause forbidding any change in the foregoing provision prior to 1885.<sup>2</sup> The constitution further forbade any "change, alteration or amendment" unless proposed by the legislature and submitted to the electors."<sup>3</sup> Nevertheless, on February 5, 1890, the legislature passed an act calling "a Convention to revise and amend the present Constitution of the State or to enact [*sic*] a new Constitution."<sup>4</sup> The act provided for the election of delegates to this convention by "all persons who are qualified electors under the present Constitution and laws of this State,"<sup>5</sup> but was silent as to the plan to be followed in putting the constitution into force, except so far as the legislative intent might have been implied from the use of the word "enact."

The convention met at Jackson, August 12, 1890. On September 2, Mr Palmer (Democrat) "introduced an ordinance providing for submitting the constitution to the people for ratification and moved its reference to a special committee of five, which motion was lost."<sup>6</sup> The proposed ordinance was thereupon laid on the table subject to call, but on the same day United States Senator George, who was one of the delegates to the convention from the state at large, offered the following resolution, which was adopted and sent to the Judiciary Committee:—

*"Resolved, That the Committee on the Judiciary, are hereby instructed to inquire into the Constitutional power of the Convention to adopt finally, on behalf of the people of Mississippi, the Constitution which may be framed by them, without a submission of the question of ratification or rejection to the qualified electors of the State, and that they report their conclusions to the Convention."*<sup>7</sup>

On September 4, Mr. W. P. Harris<sup>8</sup> as chairman, and in behalf of the Judiciary Committee, reported,<sup>9</sup>—

<sup>1</sup> Art. I, sec. 18; Poore, "Charters and Constitutions" (Washington, 1877), II, 1082.

<sup>2</sup> Art. XIII; Poore, II, 1094.   <sup>3</sup> *Id.*   <sup>4</sup> Laws of Mississippi (1890), 53.   <sup>5</sup> *Id.*

<sup>6</sup> Journal of the Mississippi Constitutional Convention (Jackson, 1890), 130.

<sup>7</sup> *Id.* 134.

<sup>8</sup> It appears from the roster of the convention that Chairman Harris was a lawyer, a member of the Jackson Bar, and was at the time seventy-one years old. Of the twenty remaining members all but one were lawyers.

<sup>9</sup> Journal of the Mississippi Constitutional Convention (Jackson, 1890), 148, 149.

"That the proposition that the work of a Constitutional Convention in revising or framing a Constitution requires for its validity, a ratification by a vote of the people, has no support in any principle of constitutional law, and is merely a political theory or doctrine which has, in some of the states, acquired authority from usage. . . . The opinions of political theorists on the question of the submission of constitutions for popular ratification are only influential as advice to the Constitutional Convention. It is idle to invoke them as propositions of Constitutional law.

"The committee therefore express the opinion with confidence that the Convention may constitutionally make the Constitution or amendments which it shall adopt absolute and final without submitting the question of ratification or rejection to the qualified voters of the state.

"W. P. HARRIS,  
"Chairman."

Although this appears to have been the unanimous report of the committee it seems never to have been formally called up and acted upon. It was not, however, permitted to pass unchallenged. On October 3, Mr. Holland (Democrat) offered the following resolution:—

"*Resolved*, That the President appoint a committee of ——— whose duty it shall be to prepare an ordinance for submitting to the people of this State, at an election to be held for that purpose, the Constitution framed by this Convention, for ratification or rejection."<sup>1</sup>

This resolution, like the report of the committee just noticed, was "read and laid (on) the table subject to call,"<sup>2</sup> but appears to have received no further consideration.

On October 22, Mr. Coffey (Democrat) proposed<sup>3</sup> an ordinance providing:—

"Sec. 1. That on the — day of ——— A.D. 18— an election shall be held in the several counties of this State for the purpose of submitting this Constitution for ratification to the registered voters thereof, in such manner that each elector can vote separately for or against either or all of the articles therein proposed. . . .

"Sec. 5. If it shall appear that a majority of the qualified electors voting at said election shall have voted for either of the several articles hereinbefore enumerated, they shall be inserted in the Constitution of this State and be a part thereof and all provisions of the present Constitution in conflict therewith shall be forever abrogated, but if it shall appear that a majority of the qualified electors voting at said election, shall have voted against either of said several articles herein-

<sup>1</sup> Journal, 328.

<sup>2</sup> Id.

<sup>3</sup> Id. 455.



before enumerated, the same shall be void, and the provisions of the present Constitution corresponding shall remain in force."<sup>1</sup>

This proposed ordinance was read, ordered printed, and referred to the Judiciary Committee, and on October 30 that committee, through Mr. Harris, its chairman, submitted the following report:<sup>2</sup>—

"Mr. President: The Judiciary Committee have considered the proposed ordinance of delegate Mr. Coffey, for the submission of the Constitution, which may be adopted by this Convention, for ratification or rejection, to the people; and instruct me to report that, in the judgment of the committee, such submission is unnecessary and inexpedient.

"W. P. HARRIS,  
"Chairman."

No direct action seems to have been taken on this report.

### *B. The Issue Joined*

Finally, on October 31, the question was brought to an issue by the following resolution offered by Mr. Burkitt (Democrat):—

"BE IT RESOLVED, That the Constitution framed by this Convention be submitted to the people for ratification or rejection at the election to be held on Tuesday after the first Monday in November, 1891."<sup>3</sup>

Mr. Dillard (Democrat) moved to lay this resolution on the table, and the ayes and noes being called, the motion to lay on the table was adopted by a vote of eighty to twenty-six, there being, however, twenty-seven members absent or not voting.<sup>4</sup>

### *C. "Enactment" of the Constitution*

Meanwhile, on October 22, Mr. Witherspoon, for the committee on Preamble, of which he was chairman, had submitted the following report:—

"Your Committee on Preambles have had under consideration the various ones referred to it, and report the following for the new Constitution:

"'We the people of Mississippi, in Convention assembled, grateful to Almighty

<sup>1</sup> Journal of the Mississippi Constitutional Convention (Jackson, 1890), 550, 551. The text of this resolution is printed in the Journal out of its regular place and in connection with the report of the Judiciary Committee thereon.

<sup>2</sup> Id. 549, 550.

<sup>3</sup> Id. 567.

<sup>4</sup> Id. 567, 568.

God, and invoking His blessing on our work, *do ordain and establish this Constitution* for the better government of the State.'"<sup>1</sup>

On November 1, Mr. Taylor (Democrat) moved that the instrument reported by the sub-committee on revision, as amended, "be adopted as the constitution of the state of Mississippi," and on this motion the vote was one hundred and four in the affirmative and eight in the negative, with twenty-one members absent and not voting.<sup>2</sup> On the same day the convention adjourned and no further steps were taken toward securing popular ratification.

#### D. The Procedure Tested in the Courts

It was hardly to be expected that the regularity of this procedure would be accepted without challenge. It was first assailed in an election contest which involved the validity of certain clauses in this constitution of 1890, relative to the qualification of electors. The contestee urged the invalidity of these provisions on the ground, *inter alia*, that the instrument of which they formed a part had never been ratified by the people. The court "with confidence" rejected the proposition as "unsound."<sup>3</sup>

The electoral provisions of the constitution were afterward brought in question before the Federal Supreme Court,<sup>4</sup> on the ground that they discriminated against the negro race. But the validity of the instrument was again affirmed on the ground that no such discrimination appeared on the face of its provisions, and that "it had not been

<sup>1</sup> Journal, 456.

<sup>2</sup> Id. 637, 638.

<sup>3</sup> *Sproule v. Fredericks*, 69 Miss. 898; *Thayer's Cases*, I, 250 (1895). "It will be remembered," says the Court, "that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it that the constitution framed shall be submitted to the people for ratification. The act of the legislature which provided for the assembling of the constitutional convention of 1890, declared that the end sought to be attained, the work to be done, was the revision and amendment of the constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the convention by imposing, or seeking to impose, upon that sovereign tribunal the mere legislative will that the constitution enacted should be submitted to the people for ratification. We have simply the case of a constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people in strict conformity to the legislative call which assembled it." See this case reaffirmed in *Dixon v. State*, 74 Miss. 277.

<sup>4</sup> *Williams v. Mississippi*, 170 U.S. 213 (1898).

shown that their administration was evil; only that evil was possible under them.”<sup>1</sup>

<sup>1</sup> It was also observed:—

“The operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime. . . . There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them. If it is done in the latter way, how, or by what means, should be shown.”

## CHAPTER XXI

### SOUTH CAROLINA

#### *A. Preliminary Steps*

THE next step in the movement was taken in South Carolina. On December 19, 1892, the legislature adopted a joint resolution providing for the submission to the people of the question of calling a constitutional convention.<sup>1</sup> This, it will be seen, was a step which had been omitted in Mississippi, and shows less of a disposition to ignore settled constitutional methods. The plebiscitum was taken at the election of 1893, and the proposition carried; and pursuant to these proceedings, the legislature on December 24, 1894, passed an act providing:—

“That a Convention of the people of South Carolina is hereby ordained to be assembled in the city of Columbia on the second Tuesday in September in the year of our Lord one thousand eight hundred and ninety-five, for the purpose of revising, amending or changing the Constitution of the State.”<sup>2</sup>

Here also, it will be seen, the legislature was more cautious than that of Mississippi. It did not expressly authorize the convention to “enact” a constitution but seems to have left open the question whether it actually intended to transfer the seat of sovereignty to that body.

#### *B. Obstruction Attempted in the Courts*

The election of delegates was fixed for the third Tuesday in August, 1895. Prior to that time, the appeal to the courts, which in Mississippi had followed the proclamation, was taken. Lawrence P. Mills, a negro, brought a bill in equity in the Circuit Court of the United States for the district of South Carolina, asking that a supervisor of

<sup>1</sup> South Carolina Laws (1892), 6.

<sup>2</sup> *Id.* (1894), 803.

election be enjoined from carrying into effect the state registration laws and alleging that

"He failed to register at the registration made after the general election of 1888, and during the days in March, 1895, provided for in the act of 1894, because, although he made repeated and persistent efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions prescribed by said unconstitutional registration laws as conditions precedent to his right to register, and that he had never been allowed to vote at any Federal or state election of the state of South Carolina; that he is desirous of voting for delegates to the said constitutional convention, and that the paper writings purporting to be books of registration, now in the hands of the defendant, do not and will not contain his name as a registered voter for the reason before stated; that he and others like circumstanced with him will not be permitted to vote at said special election by the managers thereof unless their names be found upon the books of registration, and they produce the registration certificate mentioned: and that, if the defendant be permitted to continue the aforesaid illegal, partial, and void registration, and be allowed to turn over to the managers of such election for the county of Richland the books of registration for said county, he, the plaintiff, will be deprived of his right to vote at said election, and grievous and irreparable wrong and damage will be done him, which can only be prevented by the interposition of this court, by way of restraining the defendant from the performance of said before mentioned acts."<sup>1</sup>

The Circuit Court, per Judge Goff,<sup>2</sup> granted a preliminary injunction on the ground that the registration laws, including those availed of by the convention act, were in conflict with the fourteenth and fifteenth amendments to the Federal Constitution. The case was thence taken to the Court of Appeals,<sup>3</sup> where the order of injunction was reversed and the bill dismissed on the ground that

"The action sought to be enjoined is political and governmental, and it is not pretended that any right of property or civil right is threatened with infringement thereby."<sup>4</sup>

Another appeal was then taken, this time to the Federal Supreme Court.<sup>5</sup> Meanwhile, however, the election of delegates had taken

<sup>1</sup> *Mills v. Green*, 67 Fed. Rep. 818.

<sup>2</sup> "It is evident," he says, "that the effect of this registration system is to fearfully impede the exercise of the right of suffrage by the colored voters of the state of South Carolina. It to a great extent, defeats their constitutional right to vote, and it seems to be its leading, — I must be permitted to say, its only, — object, the effect being to so legislate as to apparently respect constitutional requirements, but at the same time to stab to the death the rights and immunities guaranteed by them." — *Mills v. Green*, 67 Fed. Rep. 832.

<sup>3</sup> *Mills v. Green*, 25 U.S. App. 383.

<sup>4</sup> Per Chief Justice Fuller, *Id.* 398.

<sup>5</sup> *Mills v. Green*, 159 U.S. 651.

place and the convention had assembled. The Supreme Court held that this left no actual controversy but only an abstract question to be determined and that, as it could grant no actual relief, it would dismiss the bill.<sup>1</sup>

This appears to have ended the attack on the new constitution through the courts.<sup>2</sup>

### C. *The Convention*

met at the time and place appointed. It numbered 160 members, but a keen critic of it observes:—

"There was a dearth of lawyers or others who had made any study of the proper field of a constitutional convention."<sup>3</sup>

Mr. Robert Aldrich was elected temporary chairman and in his opening speech he declared that

"With the exception of the constitution of 1790, the one now to be framed is the only one that is entitled to be called the exponent of the untrammelled will of the people of South Carolina."<sup>4</sup>

As we shall see, this idea appears to have been so prevalent at the close of the convention as to make submission seem unnecessary.

The question uppermost in the minds of the delegates was, of course, the suffrage problem, and this occupied the major part of their attention. Nevertheless the work of the convention extended far into the field of general legislation, and on this account it has been much criticised.

"One of the most noticeable features of this convention and its work," says Mr. Eaton, "is the want of knowledge shown of the proper sphere of a constitution and of the difference between what should be put into the constitution and what should be left for the legislature to enact as statutes. No one seems to have pointed out that a constitution should contain only the great fundamentals of

<sup>1</sup> "It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted." — *Mills v. Green*, 159 U.S. 658.

<sup>2</sup> See, however, *Wiley v. Sinkler*, 179 U.S. 58, which was an action against a Charleston Election Board to recover damages for rejecting plaintiff's vote for a member of Congress. The Supreme Court held that the Circuit Court had jurisdiction, but affirmed its judgment of dismissal on the ground that plaintiff had failed to allege that he was a registered voter under the South Carolina laws. The court expressly disclaimed any intention of passing on the validity of the convention's acts.

<sup>3</sup> Eaton, "The Late Constitutional Convention of South Carolina," *American Law Review*, XXXI, 199. Cf. 210.

<sup>4</sup> *Id.* 198.

the organic law, leaving the details of law-making to the legislature. The members of this convention failed to grasp this principle and therefore their work included too much law-making. It was even moved by one member 'that there shall be no session of the legislature this year, but the convention shall do its work in its place.' It would have been but a step further for the convention to continue indefinitely in session and to carry on the government of the state."<sup>1</sup>

Whether there was any considerable sentiment in the convention favorable to submitting the new instrument to the people seems difficult now to determine with certainty. "Unfortunately the convention voted that no official stenographic report of their proceedings should be taken, and we are therefore deprived of the assistance such a report would furnish."<sup>2</sup>

It seems probable, however, that, in view of the then recent action in Mississippi and of the avowed purpose of the convention, no such plan was seriously considered. The labors of the convention were concluded on December 4, 1895, and on the last day of the same month the new instrument became operative according to its terms.

<sup>1</sup> Eaton, "The Late Constitutional Convention of South Carolina," *American Law Review*, XXXI, 210.

<sup>2</sup> Id. 203.

## CHAPTER XXII

### DELAWARE

THE next constitution to be adopted without popular ratification was that of Delaware. We have seen how the movement to supplant the state's obsolete constitution of 1831 was defeated by the electors of 1853.<sup>1</sup> For a generation afterward the people of that state appear to have continued under the old instrument without further effort to displace it. The existing constitution made it necessary to submit the question of calling a new convention to the people at a special election. Under this hampering restriction, repeated efforts were made to obtain the required majority for a new convention. The question was submitted in 1887, and again in 1891, and although the results of the last attempt show a growth of sentiment in favor of the proposal, the number was still insufficient.<sup>2</sup> Finally the legislature exercised the prerogative confided to it by the existing constitution of adopting amendments by a two-thirds vote of one legislature and a three-fourths vote of its successor and the time of submitting the question was thus changed from a special to a general election.<sup>3</sup> By making this change the proposal was brought before the electors at a time when there was more to call them to the polls and this time the attempt was successful and the proposition was adopted. The legislature, at its ensuing session, passed the constituent act and at the same time declared that

"In the opinion of this Legislature the constitution framed by the Convention hereinbefore provided for should be submitted for the approval of the legal voters of this State."<sup>4</sup>

This opinion, however, did not seem to have weight with the convention, for, when that body met at Dover City in 1897, it proceeded

<sup>1</sup> *Ante*, 249.

<sup>2</sup> Oberholtzer, "The Referendum in America" (2d Ed., New York, 1900), 135.

<sup>3</sup> Delaware Session Laws (1893), 540.

<sup>4</sup> *Id.* (1895), 234, sec. 8.



to frame a new instrument which, without other formality, it declared should "take effect" on June 10 of the year last named.<sup>1</sup>

The reason for this course could hardly have been the same as in the states of the far South.<sup>2</sup> While the convention made some important changes in suffrage qualifications, notably in requiring an elector to be able to "read this constitution in the English language and write his name,"<sup>3</sup> still this alone does not seem to have occasioned a fear that it would prevent the adoption of the instrument. The difficulties attending the plebiscite, which had preceded the convention, afforded no doubt a practical consideration which influenced the delegates and led them to think that the surest policy was to proclaim the instrument. Another reason for this action was probably an historic one. Delaware had lain largely outside of the path of the great movement for popular ratification which had swept through the adjoining states before the middle of the nineteenth century. None of its three previous constitutions had been submitted to the electors. It is true that a proposed instrument had once been submitted to the electors, but the people of Delaware had never actually lived under a popularly adopted constitution. And not only did the convention of 1897 itself proclaim the instrument which it framed as the constitution of the state, but it also retained that feature of the instrument of 1831 which permitted two successive legislatures to adopt constitutional amendments and reduced the required vote to two-thirds.<sup>4</sup> Another clause provided, however, for the calling of a constitutional convention by a majority of the electors voting on the question at the next general election after submission,<sup>5</sup> but no provision was inserted requiring future proposed constitutions to be submitted. A different spirit has since been shown by providing for the adoption of the advisory initiative and referendum as to ordinary legislation and the submission of questions to a direct vote of the people.<sup>6</sup>

<sup>1</sup> Delaware Constitution (1897), Art. V, sec. 2 (published by the Secretary of State, Wilmington).

<sup>2</sup> Mr. Oberholtzer ("Referendum in America," 122) quotes a prominent Delaware lawyer, "who informed him that the 'constitution was not submitted to popular vote because it was felt that the delegates who were elected for this purpose knew more about making constitutions than the people did.'"

<sup>3</sup> Delaware Constitution (1897), Art. V, sec. 2 (published by the Secretary of State, Wilmington).

<sup>4</sup> Id. sec. 1.

<sup>5</sup> Id. sec. 2.

<sup>6</sup> See *post*, Chap. XXIX.

## CHAPTER XXIII

### LOUISIANA

THE state of Louisiana followed the lead of Mississippi in dealing with the suffrage problem through a constitutional convention. The history of these two commonwealths with respect to their constitutions had not been greatly dissimilar. Of the seven constitutional conventions of Louisiana all but two submitted their work to the judgment of the electors.<sup>1</sup> The first constitution of the state, framed in 1812, was not submitted and the secession convention of 1861 declared certain constitutional amendments to be in force without the formality of submission.<sup>2</sup> But constitutions had been adopted by a popular vote in 1845, 1852, 1864,<sup>3</sup> 1868, and 1879,<sup>4</sup> and of the last it had been judicially declared that it "was not operative from the date of its adoption by the convention but only from its ratification by the people as evidenced by the promulgation of the result of the election."<sup>5</sup> Thus the weight of precedent in Louisiana was clearly in favor of the practice of popular ratification.

#### *A. The Movement for a New Constitution*

##### *I. Origin and purpose*

The conditions under which the latest and existing constitution of Louisiana was put into force are described, as viewed from opposite standpoints, in two contemporary papers. One is a *critique* on the work of the convention by Mr. Amasa M. Eaton, an eminent

<sup>1</sup> Jameson, "Constitutional Conventions," 650, 651.

<sup>2</sup> Id. Cf. sec. 247 of the same work.

<sup>3</sup> This was a reconstruction constitution, and, though ratified by the voters, the government organized thereunder was declared illegal by subsequent acts of Congress. Jameson, "Constitutional Conventions," 650, 651.

<sup>4</sup> Id. 651.

<sup>5</sup> State ex rel. Reufner v. Mayor of Morgan City, 32 La. Ann. 81 (1880).

writer and specialist in this field; the other is a special message from the then governor of Louisiana, the Hon. Murphy J. Foster, to the legislature which passed the act providing for the convention. In order that the diverse views concerning the work of this body may be fairly presented, these two documents will be referred to *in extenso*.

Mr. Eaton says:—

"The long continued domination of one political party in Louisiana led there, as it has elsewhere, to abuse of power and fraud. The faction in power resorted to whatever means became necessary to keep the negroes from exercising the political power that was theirs, had they been well organized. Fraud upon the negroes naturally led to fraud upon members of any opposing faction, even if nominally of the same party. New political combinations resulted, of populists, protectionists, and opponents of election frauds. It is said that they were actually in the majority but the so-called Democrats being in possession of the machinery of political power, managed to retain it. This led to a cry for a Constitutional Convention to form a new Constitution by which the political power of the negroes could be fettered. The problem was to get a new Constitution that would eliminate much more than half the vote of the citizens, and yet that would not be defeated if submitted to the voters of the State, including those who would be disfranchised under it. On the other hand, if a call were issued for a Convention with full powers to frame a new Constitution, the party in power without the approval of a majority of the voters, would certainly oppose the calling of a Convention, as one of its first acts would be the abolition of the existing administration. The difficulty was skilfully solved by drawing up and passing an act to be submitted to the voters, calling for a Convention, but with limited powers, and providing also that the new Constitution should go into effect without the approval of the electors."<sup>1</sup>

Governor Foster's message was, in part, as follows:—

"The present Constitution, which has now been in force for nearly seventeen years, contains many admirable provisions. In some respects, however, it has been found to be deficient in its active operation. Chief among these defects experience has shown that the qualifications for suffrage, as at present established, are such as to extend the elective franchise to a large mass of ignorance and venality, to the great detriment of the best interests of the commonwealth. While most of the other States of the American Union have made substantial progress and improvement in this respect, by imposing in their organic laws reasonable and proper limitations upon the exercise of the elective franchise, whereby the grossly ignorant and incompetent have been eliminated and excluded from the electorate, Louisiana has continued to suffer from this evil. This has grown so significant in recent years that the popular mind is now thoroughly possessed

<sup>1</sup> Eaton, "The Suffrage Clause in the New Constitution of Louisiana," *Harvard Law Review*, 279.

with the idea that its longer continuance is a standing menace to free government and civil liberty within its borders. Mindful of this great political exigency your predecessors in the last General Assembly, among other amendments to the present Constitution, passed and submitted to the voters of the State at the last election one looking to the limitation of suffrage to such citizens as could read the Constitution in their mother tongue, or in default of such knowledge, to tax-payers on property to the amount of two hundred dollars. Unfortunately the submission of this proposed amendment, with the others, was, under the provisions of the Constitution, made at the same time with the general election for State, parochial and municipal officers. In this way the fate of this beneficent measure became involved with local and partisan questions, as well as individual ambitions and struggles for office, in such a manner as to eventually insure its defeat. I believe, in common with a large portion of the people, that if the submission of the question had not been so handicapped by extraneous circumstances, and had it been decided on its individual merits alone, it would have been ratified and adopted by a large majority of the electors.

Be that as it may, however, the fact cannot now be disguised or ignored that there is a large and growing sentiment in the State as to the paramount and immediate necessity for some change in this respect. I deem it unnecessary to argue here its importance and necessity, as, in my opinion, the great body of the people regard it as a self-evident proposition. There are other amendments and changes which may be made in the Constitution, to the great advantage of the people and the State, but the question of limitation of suffrage, to my mind at least, overshadows all others in importance.”<sup>1</sup>

## 2. *In the Legislature*

The General Assembly of the state of Louisiana convened in regular session at Baton Rouge on May 11, 1896. On June 18, Mr. Trezevant, of Shreveport, introduced into the House of Representatives a bill with the following title:—

“An act Providing for the submission to the people of a proposition to hold a convention at a designated time and place for the purpose of framing and putting into effect a new Constitution; to fix the powers of the said convention; to provide for the election of delegates thereto; and to make an appropriation to defray the expenses thereof.”<sup>2</sup>

The progress of the measure seems to have been facilitated by the message of the governor already alluded to, and on June 24 it was considered in committee of the whole, favorably reported, and the report adopted.<sup>3</sup> The Journal is silent concerning the debate on this, as well as the other measures pending before the body, but on

<sup>1</sup> Journal of the House of Representatives of Louisiana (1896), 363.

<sup>2</sup> Id. 286.

<sup>3</sup> Id. 393.

the following day when the bill came up for final passage, there were significant speeches by certain of the members in explanation of their votes. Mr. Stewart (Populist), from Pollock, said:—

Mr. Speaker: Knowing that the people that I represent are not in favor of a convention with limited powers and believing that it is a step in the direction of taking the government of this state out of the hands of the masses and putting it in the hands of the classes, and believing that this should be a government of the people, for the people and by the people, I therefore vote 'no.'<sup>1</sup>

Mr. Gunby (Populist), from Union, said:—

"I vote 'no' on this bill for the reason that I consider a proposition to limit a Constitutional Convention to act only on such measures as the majority of the legislature want passed upon as an insult to the patriotism and intelligence of the people of this state, and for the further reason that I promised the people whom I represent that I would not vote for a measure which I knew they did not want, and I think that promises and pledges should be kept sacred. I am in favor of an unlimited Constitutional Convention, and no other kind."<sup>2</sup>

Mr. James (Populist), from Winn said:—

"This call for a Constitutional Convention limits the work of such convention, except as to unimportant details, to a revision of the suffrage, the basis of all republican forms of government. Such convention is given unlimited power to deal with this fundamental question and its work becomes the constitutional law of the State without reference to the people. The delegates composing this convention are to be elected by an electoral system or machine that is so completely in the hands of the so-called Governor of this State that the result will be the same as if the said so-called Governor appointed a majority of said delegates.

"Under such provisions and conditions this call differs from the late lamented 'suffrage amendment' only that it is eighty thousand dollars (\$80,000) more expensive to the tax-payers of this state.

"This call for a Constitutional Convention should, therefore, meet with the same fate as the aforesaid 'Suffrage Amendment' which was buried with an avalanche of votes so deep that it has not since been heard from. I therefore vote 'no.'"<sup>3</sup>

The bill finally passed the house by a vote of 59 to 36, with two members absent.<sup>4</sup>

The bill thus passed by the house reached the senate on June 25, and was referred to the committee on finance, by which it was re-

<sup>1</sup> Journal of the House of Representatives of Louisiana (1896), 417. The limitation upon the powers of the convention complained of in this and the following speeches was afterward made the basis of an attack on the constitution framed by it. See *State v. Favre*, 51 La. Ann. 536.

<sup>2</sup> Journal of the House of Representatives of Louisiana (1896), 417.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* 416, 417.

ported favorably.<sup>1</sup> Two substitute measures were offered,<sup>2</sup> one of which contained the following provision:—

"Sec. 5. Be it further enacted, etc. That the Constitution framed by said convention shall be submitted to the people for their adoption or rejection."<sup>3</sup>

Both of these measures were rejected, the latter by a vote of 26 to 7, with three members absent,<sup>4</sup> and the house bill was made a special order for June 30,<sup>5</sup> and on that day it came on for final passage. Senator Martin (Democrat) explained his vote as follows:—

"In voting on this measure I desire to state that a call for a Constitutional Convention should contain no limitations or restrictions. The people when in convention assembled are supreme, and the Legislators have no right to dictate to them what they should or should not do. I favored, by my amendments to this bill, which unfortunately have been defeated, an unlimited Constitutional Convention assembled and that they will so regard their rights when assembled and if necessary disregard whatever limitations or restrictions which are contained in this bill, I vote 'yea.'"<sup>6</sup>

Senator Sholars (Democrat) said:—

"The pending bill declares that there are certain measures about which the people should not legislate. The people are sovereign and we are their servants. This relationship constrains me to declare that I cannot vote for a bill which, while calling them together to frame an organic law, would yet tie their hands as to action on many important measures."<sup>7</sup>

On the roll-call twenty-five senators voted in favor of the measure and seven against, three being absent.<sup>8</sup> On July 7, the measure received the executive approval and became a part of the law of Louisiana.<sup>9</sup>

### 3. *The Measure*

The law thus enacted has been styled "a curiosity among the acts calling Constitutional Conventions."<sup>10</sup> It provided for submitting proposals for a convention, "with full power to *frame and adopt, without submission to the people, a new Constitution for the State,*" and then proceeded to enumerate certain subjects upon which the convention was prohibited from acting.<sup>11</sup>

<sup>1</sup> Journal of the House of Representatives (1896), 262.

<sup>2</sup> Journal of the Senate of Louisiana (1896), 262-266. <sup>7</sup> Id. 296, 297.

<sup>3</sup> Id. 266.

<sup>4</sup> Id. 267.

<sup>5</sup> Id. 296.

<sup>6</sup> Id.

<sup>8</sup> Id. 296.

<sup>9</sup> Acts of Louisiana (1895), 85.

<sup>10</sup> Eaton, "The Suffrage Clause in the New Constitution of Louisiana," *Harvard Law Review*, XIII, 281.

<sup>11</sup> Acts of Louisiana (1896), 85.

Mr. Eaton further characterizes the act as

"a very shrewd device to tie the hands of the members of the Convention, and yet to put into effect the result of their deliberations without submission to the electors. . . . It would seem that great indeed must have been the necessity for a new Constitution, when coupled with an affirmative vote for calling a Constitutional Convention, was the renunciation by the electors of their right to pass upon the results of the labor of the Convention. This may be shrewd politics, but it is poor statesmanship thus to compel the electors to renounce their rights or else go without a much needed new Constitution."<sup>1</sup>

### B. *The Convention*

On February 8, 1898, the convention met at Tulane Hall in New Orleans. All but one of the one hundred and thirty-four delegates were present. In point of nationality the members included twenty-one only of the original French stock,<sup>2</sup> and politically the body was overwhelmingly Democratic, there being but one of any other political faith and he a populist.<sup>3</sup> The convention was called to order by Chief Justice Nicholls, who had performed a similar duty at the last preceding convention, held nineteen years before, and Hon. Ernest B. Kruttschnitt was unanimously elected President.<sup>4</sup> The attention of the delegates was largely devoted to the discussion of plans concerning the suffrage, and this fact, together with the peculiar wording of the act under which the convention was called, seems to have foreclosed any extensive discussion as to whether the results of its labors ought to have been referred to the people. At any rate, when it adjourned on May 13 it had exercised the power of "putting into effect a new constitution" which the statute in terms conferred and left nothing more to be done by the voters.

### C. *Validity of the Constitution Assailed*

As in Mississippi and South Carolina this action was not accepted as final and steps were soon taken to question its validity in the courts. In a murder case,<sup>5</sup> tried in the parish of Acadia during 1898, the accused filed a motion to quash the indictment on the ground, *inter alia*, that

<sup>1</sup> Eaton, "The Suffrage Clause in the New Constitution of Louisiana," *Harvard Law Review*, XIII, 281.

<sup>2</sup> Id.

<sup>3</sup> Id. 290.

<sup>4</sup> Id. 282.

<sup>5</sup> *State v. Favre*, 51 La. Ann. 434 (1899).

"the pretended Constitution of the State, of 1898, under which this defendant was indicted and now held for trial, is unconstitutional and illegal, null and void, for this, viz.; that it was passed and adopted in contravention of Article 256 of the Constitution of 1879, which provides, that all amendments shall be submitted to the electors for their approval or rejection," and "that the pretended Constitution of 1898 is a mere amendment of the Constitution of 1879, and is therefore null and void, never having been submitted to the people as required, as aforesaid."<sup>1</sup>

The trial court overruled the motion, holding

"that the act calling the convention was in the nature of a proposition submitted to the people as to whether or not a convention should be held, and if held, that it should be held as provided in the act, a feature of which was, that it would *not* have to submit its work to the people.

"When, therefore, the people voted to hold a convention, they declared that it should be held and adopted without submission to the people, as had been specially provided for in the act calling same together."<sup>2</sup>

The case was thereupon appealed to the Supreme Court, where the validity of the new instrument was again declared. The reasoning of the court was in part as follows:<sup>3</sup>—

"The principle [*sic*] contention of counsel in favor of his theory is, that the legislative act which proposed the convention scheme, suggested certain restrictions to be placed upon the delegates to be thereto accredited, when in convention assembled, and that, in consequence thereof, certain provisions of the Constitution of 1879 were left in full force; hence the present Constitution is essentially an amendment thereof. . . . That the terms of the statute proposing a Constitutional Convention were not unlimited and sweeping, would seem to make no practical difference, as the convention was called upon the lines which were suggested by the legislature, and in exact conformity with the will of the sovereign, as expressed at an election duly held in keeping therewith, and the delegates duly chosen thereto were regularly convened and organized, and thereafter framed and promulgated an instrument which is styled a *Constitution* for the state of Louisiana.

"We deem it to be our duty to accept that instrument as *the organic law* of the State without any hesitation, or resort to any refined distinctions or subtle argument on the question; and thus accepting same, it is, in our opinion, exactly what it purports to be, a Constitution and not an amendment to an existing Constitution."

<sup>1</sup> Id. 435.

<sup>2</sup> Id.

<sup>3</sup> Id. 436.



## CHAPTER XXIV

### VIRGINIA

#### A. *The Preliminary Movement*

THE most recent participant in the movement now under discussion is Virginia. The constitution of 1869, generally known as the "Underwood" constitution, had been a source of dissatisfaction from the first, and resolutions looking toward its amendment or displacement had been introduced at every session of the legislature since 1874.<sup>1</sup> In 1888, an act referring the question to the people was passed.<sup>2</sup> But the poll taken the following year showed an overwhelming majority against the proposition.<sup>3</sup> The course of events in the states farther south was, however, keenly followed in Virginia,<sup>4</sup> and probably did much to change public sentiment on the question of calling a convention, and when another proposal was submitted in 1896, though defeated, it received a much larger vote than on the previous occasion.<sup>5</sup> Finally, in 1900, the question was again submitted,<sup>6</sup> and the result was a large majority in favor of a convention.<sup>7</sup>

In view of subsequent events the language of the constituent act, passed in pursuance of this vote, is important. It provided that the delegates elected should meet "in general convention to *consider, discuss, and propose* a new constitution or alterations to the existing constitution."

<sup>1</sup> Chandler, "The History of Suffrage in Virginia," Johns Hopkins University Studies, XIX, 341.

<sup>2</sup> Id.; Brenaman, "A History of Virginia Conventions" (Richmond, 1902), 81. This was in pursuance of a constitutional requirement.

<sup>3</sup> Brenaman, id. The vote was 63,125 against and 3698 in favor.

<sup>4</sup> See the remarks of President Goode of the convention, Brenaman, "A History of Virginia Conventions," 89.

<sup>5</sup> Id. 82; Chandler, "History of Suffrage in Virginia," Johns Hopkins University Studies, XIX, 342.

<sup>6</sup> Virginia Session Laws, 1900, 835.

<sup>7</sup> The vote was 77,362 to 60,375. See Brenaman, 83.

It further provided that:—

“If said convention shall agree upon a revised and amended constitution on or before the 5th day of October, 1901, the said revised and amended constitution *shall be submitted to the qualified voters of the commonwealth* as a whole or by separate articles or sections, as the convention may determine, for ratification or rejection, at the general election to be held on the 5th day of November, 1901.”

Provision is then made for the method of voting, and the act continues as follows:—

“But if said convention shall not propose a revised and amended constitution on or before the 5th day of October, 1901, it shall remain for the next General Assembly to enact such measures as it may deem proper for submitting said revised and amended constitution to the people of this commonwealth for ratification or rejection.”<sup>1</sup>

Undoubtedly, one of the efficient causes which finally brought about the adoption of the proposal for a convention was the course of the organization of the dominant political party in Virginia. That party had at its state convention at Norfolk in May, 1900, just before the poll was taken, adopted a resolution favoring a new constitution and declaring it the sense of that body “that when such a constitution shall have been framed, it shall be submitted to a vote of the people for ratification or rejection.”<sup>2</sup> It is very clear therefore that before the electors of Virginia expressed themselves on the question of calling a convention it was understood and expected that the work of that body was to be ratified by the people.

### B. *The Convention*

Delegates were chosen in May, 1901, and the convention assembled at Richmond in the following month. It included one hundred members, of whom less than one-half were lawyers.<sup>3</sup> On political lines the dominant party in the state had an overwhelming majority

<sup>1</sup> Virginia Session Laws, 1901, p. 262. This statute was entitled “An Act to Provide for the Selection of Delegates to the Constitutional Convention for the convening of said delegates, the organization of the said convention, and for submitting the Revised and Amended Constitution to the people of the State of Virginia for ratification or rejection.”

<sup>2</sup> Chandler, “History of Suffrage in Virginia,” Johns Hopkins University Studies, XIX, 344, 345.

<sup>3</sup> McKinley, “Two New Southern Constitutions,” *Political Science Quarterly*, XVIII, 481.

of the delegates, there being but eleven of their opponents out of the total number.<sup>1</sup> While the main purpose of the majority was the exclusion of the negro from the franchise, another question incidental thereto, but more directly in point here, soon became a leading issue in the convention. This was the question, whether the new instrument should really be submitted to the electors, and if so, then, whether to the electors designated by the old or the new constitution. The latter phase of the question was, it will be remembered, very similar to the one which confronted the predecessors of these delegates in the Virginia convention of 1829.<sup>2</sup> As to the first phase of the question, there would seem to be but little doubt from a legal standpoint. But a majority of the delegates were not lawyers, as was the case in the contemporary Alabama convention; they were largely business men and farmers.<sup>3</sup> During the eighteen days of debate,<sup>4</sup> which raged over the question of the convention's power to put its work in force without popular approval, those who took the affirmative revived the eighteenth century arguments in support of the theory that the convention is sovereign; but the practical argument which appears to have weighed most was the fear of rejection — the belief that the class about to be disfranchised, together with other dissatisfied elements, would be sufficiently numerous to insure the defeat of the new instrument.

The question was not settled upon the close of the debate, which took place in September, 1901, but the vote was deferred until a later date and the opinion still prevailed that the constitution would be submitted.<sup>5</sup> In April, 1902, the convention took a recess of about six weeks and the question of submission was held in abeyance during all this period. Instead of a formal submission according to law and pursuant to the constituent act, the dominant party had decided upon a reference of the question to its own members. At first it was proposed that primaries should be held for this purpose, but afterward mass meetings were substituted for these and their expres-

<sup>1</sup> McKinley, "Two New Southern Constitutions," *Political Science Quarterly*, XVIII, 481.

<sup>2</sup> See Brenaman, "A History of Virginia Conventions" (Richmond, 1902), 91, 92. Cf. *ante*, 219-222.

<sup>3</sup> McKinley, "Two New Southern Constitutions," *Political Science Quarterly*, XVIII, 481.

<sup>4</sup> *Id.* 508. Cf. Brenaman, 92.

<sup>5</sup> McKinley, "Two New Southern Constitutions," *Political Science Quarterly*, XVIII, 508, 509.

sions were largely in favor of proclaiming the constitution.<sup>1</sup> It was the voice of this unofficial and extra-legal organization which finally determined the question over which the delegates had so long debated. The expressions of these mass meetings were more potent than constitutional precedents or acts of the legislature. When the convention reassembled in May, 1902, there was another, though brief, debate, and on the 29th of the month, by a vote of 47 to 38, the convention decided to proclaim the instrument in force without submitting it to the people.<sup>2</sup> On June 6 following, by a vote of 90 to 10, the constitution was formally adopted.

The instrument thus put into force is one of extreme length and well illustrates the tendency of later constitutions in this direction. On the suffrage question, it incorporates both the "hereditary" and the "understanding" clauses of its recent predecessors in the South.<sup>3</sup> As to future amendments it retained the provision of the instrument of 1869, but changed this in respect to calling future conventions and authorized proposals at any time by a majority of the general assembly, omitting the requirement of periodical consultation of the people, which its predecessor had contained.<sup>4</sup>

### *C. Attempts to test the Validity of the Constitution*

It seems to have been understood from the first that the course pursued by the convention was irregular and would be challenged. As soon as the vote in favor of proclaiming had been announced, the following resolution was offered by a delegate who had opposed the action of the majority,<sup>5</sup> and was adopted:—

*"Resolved, That as it has been determined to proclaim the constitution, provision should be made for its recognition, when adopted, by the political departments of the government and to that end the general assembly shall be convened at an early date."*

Pursuant to this resolution, the general assembly was convened in special session for the purpose of taking an oath to the new instrument

<sup>1</sup> McKinley, *Political Science Quarterly*, 508, 509.

<sup>2</sup> Id. The figures are as given by Brenaman, "A History of Virginia Conventions," 93. McKinley gives the vote as 48 in favor.

<sup>3</sup> Art. II; Brenaman (2d Pt.), 4.

<sup>4</sup> Art. XV; Brenaman (2d Pt.), 65.

<sup>5</sup> Brenaman, "A History of Virginia Conventions," 93.

as prescribed therein.<sup>1</sup> The assistant secretary of the convention declares that,

"After this was done the strongest opponents of proclamation admitted that the new constitution could not be successfully assailed in the courts."<sup>2</sup>

It was "assailed," however, even if not successfully. Actions were brought in the United States Circuit Court, sitting at Richmond, for the purpose of having the instrument declared inoperative, but these were dismissed in the month of November, 1902, on the ground that the Federal court had no jurisdiction.<sup>3</sup> An appeal was then taken to the Supreme Court of the United States, where a similar ruling was made.<sup>4</sup> At the time of the decision in the lower court, it was announced that actions would be commenced against members of the convention by negroes who had been denied registration under the new instrument.<sup>5</sup>

It will be seen that the question of the validity of this constitution is presented in a much more acute form than in the other states which had preceded in this line of action, and where the constituent act either expressly authorized the convention to proclaim its instrument, as in Mississippi, or else was silent on that point. To uphold the course of the Virginia delegates it is necessary not merely to revive the exploded theory that the convention is sovereign, but also to maintain that sovereignty resides in that body notwithstanding it was created by the people upon the express condition that it should submit its work to them. Such a theory seems to be without support in law, logic or morals.

Such a course, too, seems peculiarly anachronistic and out of place in Virginia. It was here that Jefferson, the earliest advocate of popular ratification in the revolutionary period outside of New England, submitted his plan to the first constitutional convention. It was here, too, that the first judicial utterance (though a *dictum*) was made, declaring it to be "the consent of the people which gives validity to a constitution."<sup>6</sup> It was in Virginia that the plan was first

<sup>1</sup> Brenaman, "A History of Virginia Conventions," 93; Schedule of Constitution, sec. 22.

<sup>2</sup> Brenaman, "A History of Virginia Conventions," 93.

<sup>3</sup> See the associated press despatches for November 29, 1902.

<sup>4</sup> See *The Nation*, LXXVIII, 322.

<sup>5</sup> See the associated press despatches for November 25, 1902.

<sup>6</sup> *Kemper v. Hawkins*, 1 *Virginia Cases*, 20.

applied to the constitution of a Southern state, and it was largely through this constitution and this precedent that the system became general throughout the South. And when we recall that even the secession ordinance was submitted to the Virginia voters and that the only break in the record, after the first attempt, was the abortive reconstruction instrument which Congress refused to approve, the proceedings of this latest convention appear as a complete departure from the beaten paths.

And indeed this remark is applicable, though to a less degree, to all those communities of the South which have attempted to return to the practice of constitution-making without a vote of the people. Their course is not alone contrary to our basic political theory — the sovereignty of the people. It is also a deliberate abandonment of one of their own most beneficial institutions, a valuable part of their ancient Teutonic heritage, and the outcome of political effort and experiment for ages. The states which have discarded submission are attempting to turn back the dial of history and to sacrifice the results of twenty centuries of civic evolution.<sup>1</sup>

<sup>1</sup> There are already signs that the reaction is only temporary. South Carolina, *e.g.*, submitted to its voters on July 14, 1908, the question of substituting "state-wide prohibition" for the dispensary system. "Equity," X, 49.

### III. PRESENT STATUS

#### CHAPTER XXV

##### SOME LAW AS TO POPULAR RATIFICATION

###### A. *The Vote Necessary to Ratify*

ABOUT the subject of this treatise there has grown a department of constitutional law, already of considerable extent and rapidly growing, to which it seems fitting to devote the closing chapter of this branch of the work. When once it is determined that a constitution or amendment shall be submitted, the further question is presented as to those by whom the ratification shall be effected. In popular language we speak of submitting constitutions and amendments to "the people," and this phrase has been incorporated into some of the constitutions themselves.<sup>1</sup> The word "people" in this connection means, of course, the voters.<sup>2</sup> But in practice it never happens that the entire body of the electorate exercises its privilege of passing on instruments thus submitted. Indeed, it frequently occurs, as will be shown later,<sup>3</sup> that only a small fraction of the voters actually participates in such determination. The question accordingly arises, When is an instrument *popularly* ratified and what proportion of the electors is necessary to effect this result? The answers of the courts to this question have not been altogether harmonious; and indeed the provisions in the constitutions themselves with respect to this are far from uniform.

We have seen that the earliest constitutions which provided for popular ratification at all, required the assent of a majority of those voting at the election. It was almost the middle of the century, how-

<sup>1</sup> Nevada Constitution, Art. XVI, sec. 1; Poore, "Charters and Constitutions," II, 1263; New Jersey Constitution (1844), Art. IX; Poore, II, 1323.

<sup>2</sup> "The people, for political purposes, must be considered synonymous with qualified voters." *Blair v. Ridgely*, 41 Mo. 177; 97 Am. Dec. 248.

<sup>3</sup> See *post*, Chap. XXVI.

ever, before a judicial construction of this phrase in a constitutional case was announced.

In 1849 the legislature of Wisconsin submitted a proposed statute extending the franchise to the negro, but to become operative upon the approval of "a majority of all the votes cast at such election."<sup>1</sup> This act received the approval of nearly one-third more than those voting against it but failed to receive a majority of the votes cast for candidates at the election occurring on the same day. When the validity of the act was afterward in question before the Wisconsin Supreme Court that tribunal rejected the contention that the act required the approval of a majority of all votes on all subjects and for all officers and declared the true meaning to require only a majority of those cast in reference to the act itself.<sup>2</sup> This conclusion has been much criticised in Wisconsin<sup>3</sup> as well as elsewhere.<sup>4</sup>

The constitutional phraseology above quoted has been construed by the Ohio court to mean "a majority of all the electors voting at the election for senators and representatives, as being the election indicated by the language 'such election.'"<sup>5</sup>

This provision of the Ohio constitution was afterward incorporated

<sup>1</sup> Wisconsin Laws (1849), Chap. 137.

<sup>2</sup> *Gillespie v. Palmer*, 20 Wis. 572. In the course of its opinion the court said: "If the first construction, requiring a majority of all the votes on all subjects and for all offices, cast at such election, in favor of the extension of suffrage, before it can be adopted, is the true construction, then the same voter might cast one vote in favor of the extension, and in voting for the candidates for the different offices cast ten votes which would be counted against the very measure he voted for. This absurdity involved in the first construction is conclusive against it. . . . It is more in accordance with the general principles of legislation upon such subjects, and more reasonable, to construe the clause as a provision for the extension of suffrage in case a majority of all the votes *on that subject* cast at any general election should be in its favor. We do not see how any other construction can reasonably be given to the clause. The words added by this construction are words which, whenever the same or similar language is used in reference to a vote on any measure or for any office, are generally understood."

<sup>3</sup> In *Bound v. Wisconsin Cent. R.R. Co.*, 45 Wis. 579, Chief Justice Ryan classes it among certain other decisions "which have long been made a reproach to the court, as judgments proceeding upon policy rather than upon principle."

<sup>4</sup> *Stebbins v. Judge*, 108 Mich. 695. See also *State v. Powell*, 77 Miss. 543, 583; *State v. Foraker*, 46 Ohio St. 694; *Rice v. Palmer*, 78 Ark. 432, where the court says: "This method of amending the Constitution by direct vote of the people is an adaptation to the American constitutional system of the initiative and referendum of the Swiss Republic. For a change there to be made in the organic law it must secure a majority, not only of all the citizens of the Republic, but of all the Cantons."

<sup>5</sup> *State v. Foraker*, 46 Ohio St. 690. Stress is laid on the intention of the constitutional framers as evidenced by the debate in the convention.



into that of Nebraska,<sup>1</sup> and the Supreme Court of the latter state held it to require "that the favorable votes be in excess of one-half of the highest aggregate number of votes cast at said election, whether such highest number be for the selection of an officer or upon the adoption of a proposition."<sup>2</sup>

The present constitution of Mississippi provides for the adoption of amendments by "a majority of the qualified electors voting," and this is likewise construed as relating to the total vote at the election.<sup>3</sup>

On the other hand, where the constitution expressly provides for the ratification of amendments by "a majority of those voting thereon"<sup>4</sup> the intent is obvious, and the courts have generally given such phrases their ordinary and natural construction.<sup>5</sup>

Questions have been raised, however, even in this connection. Thus the Kansas court found it necessary to decide that the phrase "a majority of the electors voting on said amendments" did not require for the adoption of a particular amendment a majority of those voting on all.<sup>6</sup> So where the requirement is "a majority of the electors qualified to vote for members of the legislature voting thereon" it could not be extended to include a majority of those enrolled on

<sup>1</sup> The amendment clause of the Ohio constitution was borrowed *verbatim* by the Nebraska convention of 1875.

<sup>2</sup> *Tecumseh National Bank v. Saunders*, 51 Neb. 805-6.

<sup>3</sup> "It is not enough now that a majority of electors voting for legislators shall vote for the amendment. The adoption of such an amendment requires a majority of all the qualified electors voting for any purpose whatever. This construction preserves the policy the state manifested by these provisions in three constitutions by universal usage before and since the war." *State v. Powell*, 77 Miss. 582.

<sup>4</sup> Kansas Constitution, Art. XIV, sec. 1; Maine Constitution, Art. X, sec. 4; Massachusetts Constitution, Art. XIII (Mass. Revised Laws, 1902, 42); Nevada, Constitution (1864), Art. XVI; South Carolina Constitution (1896), Art. XVI, sec. 1.

<sup>5</sup> *Prohibitory Amendment Cases*, 24 Kan. 700; *Bott v. Secretary of State*, 63 N.J.L. 289; 62 N.J.L. 107.

<sup>6</sup> "It is said that, computing the vote by precincts, it is apparent that more than twice 92,302 voters voted on the two amendments, some on one and some on the other, and that, before any one amendment is adopted, it must appear that a majority of all who voted on all the amendments, voted in the affirmative on the one. This does not commend itself to our judgment. A more correct interpretation, grammatically, of this language would be, that no single amendment could be adopted unless all were, there being no provision for adopting one out of several. But we think the clear intent is, that every amendment submitted shall stand upon its own merits, and that if a majority of those voting upon it is in the affirmative, it becomes a part of the constitution. This idea is confirmed by the further provision, that where more than one amendment is submitted, they must be so submitted as to enable the voters to vote on each separately." — *Brewer, J.*, in *Prohibitory Amendment Cases*, 24 Kan. 700.

the poll lists nor even of those who cast ballots.<sup>1</sup> Nor can such language be construed so as to confine the electorate on constitutional changes to those qualified to vote for members of the legislature.<sup>2</sup>

But it is when the language of the requirement is general, specifying only a majority of the electors, that the greatest diversity of interpretation, naturally, is found. The phrase "a majority of all the voters present and voting" has been construed to require only a majority of those voting on the proposition.<sup>3</sup> The same construction was given to the clause "a majority of the electors,"<sup>4</sup> and even where the language was "a majority of the legal votes cast."<sup>5</sup> But we have already seen that the opposite interpretation has been placed on the words "electors voting."<sup>6</sup> And such is also the view of the Indiana court as regards the phrase "a majority of said electors."<sup>7</sup>

In both judicial and academic discussions of these questions, light has been sought from the construction of analogous phrases in the statutes providing for the submission of administrative questions to a popular vote.<sup>8</sup> But it has been judicially declared that "such decisions are of very little value in the solution of these questions."<sup>9</sup>

<sup>1</sup> *Bott v. Secretary of State*, 63 N.J.L. 289, where the court said: "By the words 'electors voting thereon' are intended the electors who exercise the right of suffrage in such manner that their votes should under the law be counted for or against the proposition submitted; and although the number of names on the poll lists may represent the number of qualified electors who attempted to vote, and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted, in the constitutional sense, and that the rejected ballots were not votes."

<sup>2</sup> *State v. Board of Ex.*, 21 Nev. 67.

<sup>3</sup> *Dayton v. City of St. Paul*, 22 Minn. 400.

<sup>4</sup> Idaho Constitution, Art. XX, sec. 1. "While it is true that some ten thousand or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were — must have been — fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent?" — *Green v. State Board of Canvassers*, 5 Idaho, 130.

<sup>5</sup> *State v. Barnes*, 3 N. Dak. 319.

<sup>6</sup> *State v. Powell*, 77 Miss. 543.

<sup>7</sup> *In re Denny*, 156 Ind. 104. Cf. *State v. Swift*, 69 Ind. 505, holding also that the legislature might provide that the total number of votes at the election should be taken as the sum of the electorate of the state.

<sup>8</sup> A collection of these decisions will be found in George F. Tucker's article on "Constitutional Law," *Cyclopædia of Law and Procedure*, VIII, 720, note 11.

<sup>9</sup> *State v. Powell*, 77 Miss. 583. Cf. *State v. Swift*, 69 Ind. 505, 520.

From the authorities which construe the constitutions themselves it is clear that the law is far from being settled or consistent as to what vote is required to ratify it. From the standpoint of public policy, however, it would seem that those decisions are soundest which construe the language wherever possible as requiring only a majority of those actually participating in the vote on the submitted proposition. To declare a constitution or amendment rejected by reason merely of the indifference of those who, while in attendance at the polls, are so unmindful of the privilege of popular ratification as to neglect its exercise when opportunity offers, is certainly to impair its benefits and often to prevent its employment when most needed.

### *B. The Legal Necessity of Submission*

We have seen how nearly universal the custom of submitting constitutions had become prior to the reactionary movement which began with the Mississippi convention of 1890. We may now inquire how far that custom has ripened into law. In other words, what shall be said of the validity of these instruments of the last decade whose history has just been reviewed? The question is not only an interesting one from the standpoint of constitutional law, but it is one of gravest public importance and concern.

The courts, in some of the very jurisdictions where these instruments have been declared in force, early gave expression to a doctrine apparently inconsistent with the course recently followed. Thus, in an early Virginia<sup>1</sup> case already cited, Nelson J., speaking for the highest court said: "It is confessedly the consent of the people which gives validity to a constitution." It is true that the instrument there involved was the Virginia constitution of 1776, which, as we have seen, was not submitted to the people, but it is at least curious to note that it was in this commonwealth which has effected the most recent and radical departure from the doctrine that it was first announced in the abstract.

In a Maryland case,<sup>2</sup> decided in 1854, it was declared that the constitution, "unlike the acts of our legislature, owes its whole force and authority to its ratification by the people." This also was largely *obiter*, but its utterance within so short a time after the submission

<sup>1</sup> *Kamper v. Hawkins*, 1 Virginia Cases, 20.

<sup>2</sup> *Manley v. State*, 7 Md. 147.

of the Maryland constitution of 1851, the first actually ratified by the electors of that state, is significant.

Of the first Alabama constitution the Supreme Court of the state said :

"The constitution can be amended in but two ways: either by the people, who originally framed it, or in the mode prescribed by the instrument itself. If the last mode is pursued . . . it must appear from the returns made to the secretary of state that a majority of those voting for representatives have voted in favor of the proposed amendments." <sup>1</sup>

In Louisiana <sup>2</sup> it was held that the constitution of 1879 operated not from the date of its adoption by the convention, but only from its ratification by the people. And it has been decided both in that state <sup>3</sup> and in Nebraska <sup>4</sup> that a constitutional amendment proposed by the legislature is ineffective without popular approval. Of the Michigan constitution it has been declared :<sup>5</sup> "That instrument can only be changed by the combined action of the Legislature and the people." And the Missouri court has more recently said : "Amendments derive their force from the action of the assembly which proposes them." <sup>6</sup>

Nevertheless it must be admitted that these expressions are principally *dicta*, and that the cases did not involve the question presented in extreme form in Virginia, where, as has been shown, the convention declared its instrument in force without the submission which was required by the constituent act. We are not without precedent, however, on this precise point.

The question concerning the implied powers of a body of this character with regard to legislation came before the highest court of South Carolina in 1834.<sup>7</sup> It is true that the body whose powers were involved was not strictly a constitutional convention; it was a convention called to nullify certain acts of Congress, but a similar principle governed, and, as we shall see, the case became a precedent for a later one relating to a constitutional convention proper.

This nullification convention had assumed to pass an ordinance defining allegiance and prescribing a new form of oath relating thereto;

<sup>1</sup> Collier v. Frierson, 24 Ala. 108 (1854).

<sup>2</sup> State v. Mayor, 32 La. Ann. 81.

<sup>3</sup> Id. 29 La. Ann. 863.

<sup>4</sup> *In re* Senate File, 31, 25 Neb. 864. The state constitution (Art. XVII, sec. 2) expressly requires the adoption of amendments by popular vote.

<sup>5</sup> Westinghausen v. People, 44 Mich. 270.

<sup>6</sup> Edwards v. Lesueur, 132 Mo. 434.

<sup>7</sup> State v. Hunt, 2 Hill (S.C.) 1.

and the court, to its credit be it said, in the face of excited popular feeling, declared,

"It is clear that the convention had no right to pass the ordinance defining allegiance."

In a much later case,<sup>1</sup> where the validity of an ordinance passed by the convention of 1868 was involved, the above case was cited with approval, and the court said:—

"It has been doubted whether any act of mere legislation in a state having a constitution can be passed by a convention called for a particular purpose. . . . The convention of 1868 was not called for a purpose fairly embracing the subject of this ordinance, which was never submitted to the people."

In a Missouri case<sup>2</sup> arising shortly after the war, the question was presented as to the validity of an ordinance adopted by the convention prescribing the qualifications of electors to whom the proposed constitution itself should be submitted. In the course of the opinion the court observed:—

"The convention might (if it had deemed proper to do so) have declared the constitution framed by it in full force and effect without making provision for its submission to the voters of the state."

"But this," as Judge Cooley says,<sup>3</sup> "was *obiter*." Moreover, so far as the case holds that a convention may, without specific authority, award force even to a temporary ordinance without obtaining the approval of the electors, it seems to be opposed to all the other authorities.

Similar questions came before the Supreme Court of Pennsylvania in cases<sup>4</sup> involving the validity of an ordinance passed by the constitutional convention of 1873, providing for the appointment of officers for the election at which the constitution was to be submitted. The constituent act of Pennsylvania, like that of Virginia, required a submission of the constitution, and the separate ordinance referred to was held void on the ground that the act conferred no authority for its enactment. To the argument that the convention had implied power to enact a constitution, the court replied as follows:—

"The convention is not a coördinate branch of the government. It exercises no governmental power, but it is a body raised by law, in the aid of the popular

<sup>1</sup> *Gibbs v. R. Co.*, 13 S.C. 242.

<sup>2</sup> *State v. Neal*, 42 Mo. 119.

<sup>3</sup> *Constitutional Limitations*, 42.

<sup>4</sup> *Wells v. Bain*, 75 Pa. St. 39; *Woods' Appeal*, 75 Pa. St. 59.

desire to discuss and propose amendments which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority."

More recently the Supreme Court of Texas had occasion to pass upon this question.<sup>1</sup> The constitutional convention of 1868 had attempted to pass a separate ordinance providing for the levy of a tax to aid in the construction of a railway. The court observed:—

"But we are of opinion that, when a convention is called to frame a constitution, it cannot pass ordinances, and give them validity without submitting them to the people for ratification as a part of the constitution. The delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election and assemblage. . . . The ordinance now under consideration was not submitted to a vote, though two others which were added to, incorporated into, and signed as a part of, the constitution, were so submitted. Since the convention could not finally legislate, and since a vote of the people was necessary to make its action effective, we conclude that the ordinance in question was invalid, and not effective for any purpose."

The doctrine of these cases appears to be somewhat qualified by a Kentucky decision.<sup>2</sup> In the proceedings for the adoption of the present constitution of that state a question arose which is thus stated in the opinion:—

"The convention met in September, 1890, and having in April, 1891, completed a draft of a constitution, it, by ordinance, submitted it to a popular vote, and then adjourned until September following. During the recess the work was approved by a majority of nearly one hundred and forty thousand, three hundred and sixty. When the convention reassembled, the delegates, moved no doubt by a patriotic impulse, made numerous changes in the instrument, some of which are claimed to be material, while others were but a change of language or the correction of grammatical errors: and as thus amended it was promulgated by the convention on September 28, 1891, as the Constitution of the State."

The instrument as promulgated was sought to be declared void on the ground that it was not the one adopted by the people. After declaring the question to be a political rather than a judicial one, and laying stress on the popular acquiescence in the new instrument, the court concludes:—

<sup>1</sup> *Quinlan v. R. Co.*, 89 Tex. 356, 34 S. W. Rep. 744.

<sup>2</sup> *Miller v. Johnson*, 92 Ky. 589.

<sup>3</sup> Id. 591.

"We need not consider the validity of the amendments made after the convention reassembled. If the making of them was in excess of its power, yet as the entire instrument has been recognized as valid in the manner suggested, it would be equally an abuse of power by the judiciary, and violation of the rights of the people, who can and properly should remedy the matter, if not to their liking, if it were to declare the instrument or a portion invalid, and bring confusion and anarchy upon the State."<sup>1</sup>

But there is also a vigorous opinion by Judge Bennett, who states and answers the question as follows:—

"Did the convention, upon its reassembling, have the extraordinary power to materially change or abrogate *in toto* the constitution, which the people, just a few weeks before, had adopted as their fundamental law, by a majority of one hundred and thirty-eight thousand votes, and declare their own production to be the fundamental law of the State for the government of their masters? I say the convention had no such power, and only a few suggestions will suffice to show the truth of my assertion."<sup>2</sup>

To the suggestion in the majority opinion that the constitution of 1850, under which the proceedings for adopting the new instrument were conducted, "contains no provision giving the legislature the power to require a submission of its work to a vote of the people," Judge Bennett replies:—

"By the silence of the constitution, the right of the people to require the submission was not surrendered, but was reserved by them as their inherent and inalienable right, which they could exercise directly by approving or rejecting the instrument; or by conferring that right upon their delegates, as agents. That construction does not impair, by implication, the rights of the people; but their rights are left as they declared them—inherent and inalienable. If we do not declare the language quoted to mean as I have indicated, but give it the construction contended for by the distinguished counsel for the appellees, we deprive the people of all legal right to alter or amend their government. Such a construction is forced, and saps the foundation of republican government."<sup>3</sup>

In the case of the recent Virginia convention the constituent act<sup>4</sup> expressly required submission, and it seems clear that the convention in proclaiming its work in force without a reference to the people was acting beyond its powers, and taking a step little short of revolutionary.

The course of the Delaware convention would seem hardly less irregular than that of the Virginia body, though there was not so much of a departure from precedent as in the latter state. In Delaware

<sup>1</sup> Miller v. Johnson, 92 Ky. 597.

<sup>2</sup> *Id.* 598.

<sup>3</sup> *Id.* 602, 603.

<sup>4</sup> Virginia Session Laws, 1901, 262.

the legislature had not only not assumed to transfer sovereignty to the convention, but it had even recommended that the instrument framed by that body should be submitted to the voters.<sup>1</sup>

The South Carolina constituent act would also seem to be insufficient to delegate to a convention the enormous power of enacting a constitution. The act, it will be remembered, provided for a convention merely "for the purpose of revising, amending, or changing the constitution." Nothing was said about "enacting" a new one. The language just quoted is similar to that used in the Kentucky constitution of 1850, prescribing the method of change which was the subject of judicial comment as follows:—

"The people, always vigilant in the protection of their rights, and being unwilling to leave that which affected their inherent rights to the construction of delegates reasoning logically from different analogies existing in the minds of each delegate, or from selfish motives, used language that clearly limited the power of the delegates to the duty of re-affirming, amending or changing the constitution. They are told that they should have in view—it should be their aim (the expression 'for the purpose' means just that thing)—the re-adopting, amending or changing the constitution. That was to be the business in hand, and none other. The language quoted does not say that the people surrendered their right to adopt or reject the work of the convention."<sup>2</sup>

And independent of authority, such a conclusion seems to be required upon elementary principles. The theory of our public law, both state and national, is that sovereignty resides in the people. It never belongs inherently to a limited body of men such as a constitutional convention.

But we have not yet determined the question presented by the proceedings of the latest Mississippi and Louisiana conventions. There the constituent acts purported to authorize the conventions to "enact" constitutions. In a well-known Mississippi case<sup>3</sup> the court makes much of this, and rests its conclusions on the ground that the convention was a sovereign body exercising powers "specially delegated to it for the purpose and the occasion by the whole electoral body."<sup>4</sup>

This, it will be seen, is the theory of Judge Tucker in the early Virginia case<sup>5</sup> and of Delegate Yancy in the Alabama secession

<sup>1</sup> Delaware Laws, 1895, p. 234, sec. 8.      <sup>2</sup> *Miller v. Johnson*, 92 Ky. 601.

<sup>3</sup> *Sproule v. Fredericks*, 69 Miss. 898, reaffirmed in *Dixon v. State*, 74 Miss. 277.

<sup>4</sup> *Sproule v. Fredericks*, 69 Miss. 898. See *ante*, 307, and cf. *dicta* in *State v. Neal*, 42 Mo. 119.

<sup>5</sup> *Kamper v. Hawkins*, 1 Virginia Cases, 20.



convention.<sup>1</sup> It was restated by Dr. J. L. M. Curry in an address before the Louisiana convention of 1898 in the following language:—

"A constitutional convention is the embodiment of popular sovereignty. Except under the mutations of the moral law and the prohibitions of the Federal Constitution, and possibly some restrictions embodied in the law summoning this body, this body is sovereign and its civil power is unlimited. Its decisions are ultimate. For expediency sake, but not of right, they may be conditioned on popular approval, but such an appeal is not essential to validity."<sup>2</sup>

This is, in other words, the theory of the delegate system as opposed to that of direct popular participation.

On the other hand Judge Cooley says:—

"No body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people—who alone are competent to exercise the powers of sovereignty in framing the fundamental law—for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the State must be enacted by the people themselves."<sup>3</sup>

So Mr. Amasa M. Eaton declares:—

"A constitutional convention is not the people in convention assembled. It is only a meeting of representatives of the people, it being manifestly impossible for the people to assemble in convention. The people by the vote of the electors should have an opportunity to accept or reject what their representatives have proposed as their form of government."<sup>4</sup>

Elsewhere the same author says:—

<sup>1</sup> "History and Debates of the Convention of the People of Alabama," 114.

<sup>2</sup> See *Harvard Law Review*, XIII, 284.

<sup>3</sup> "Constitutional Limitations" (5th Ed., Boston, 1883), 41. This passage was doubtless one of those referred to by the court in *Sproule v. Fredericks*, 69 Miss. 898, when it said: "The theorizing of the political essayist and the legal doctrinaire by which it is sought to be established that the expression of the will of the legislature shall fetter and control the constitution-making body, or, in the absence of such attempted legislative direction which seeks to teach that the constitutional convention can only prepare the frame of a constitution, and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

<sup>4</sup> "The Late Constitutional Convention of South Carolina," *American Law Review*, XXXI, 198.

"A constitutional convention no more embodies the sovereignty of the people than the legislature does. Both are but the agents of the sovereign power. Not even the vote of the electors to accept the result of a constitutional convention as the supreme law of the state without ratification by the electors constitutes a convention the sovereign power."<sup>1</sup>

It must be remembered that in Mississippi the people were not consulted with regard to calling the convention. The legislature, without referring the question to the electors, passed the constituent act and assumed to vest the convention with power to proclaim a constitution. The crucial question then is whether, without express authority from the sovereign people, the legislature may thus transfer sovereignty to a convention. This question the Supreme Court of Mississippi alone has thus far answered in the affirmative, and even that court seems to recognize the importance, if not necessity, of popular ratification, for in a later case <sup>2</sup> it speaks of

"the great principle which imperatively demands that the great organic law of the state, its constitution, supreme and paramount over every interest, shall never be altered or changed except upon the maturest judgment, and by a majority sufficient to warrant the conviction that the change has met the approval of intelligent freemen."

<sup>1</sup> "The Suffrage Clause in the New Constitution of Louisiana," *Harvard Law Review*, XIII, 284.

<sup>2</sup> *State v. Powell*, 77 Miss. 582 (1900).

## CHAPTER XXVI

### RECAPITULATION AND RESULTS

IN origin, this movement for popular participation in law-making, as the preceding pages are an endeavor to show, is a part and consequence of the revival of democratic ideas begun in the sixteenth century and introduced among the English-speaking peoples by the Calvinists. In the United States, popular ratification first appears in those regions which were settled by those of the Calvinist persuasion; where they predominate, it first attains full development, and where they are less numerous the beginnings of the movement are often directly traceable to them, and it finds lodgment earlier than in the sections where they did not settle. As it extends westward the movement finds a new source of growth in local conditions and necessities, and, particularly in the agricultural states of the middle west and the mining states of the Pacific slope, it is aided, if not inaugurated, by spontaneous organizations of a primitive character much resembling those in which it first appeared among the Teutonic peoples.

Chronologically, the history of popular ratification as applied to American State Constitutions may be divided into three distinct periods. In the first, lasting from 1776 to 1821, constitutions were generally adopted without submission. This period of forty-five years witnessed the adoption of no less than twenty-six state constitutions. But only six of these were ratified by the electors, unless we include the second constitutions of South Carolina and Pennsylvania in which there was a *quasi*-submission to the people. The six in which the electors actually voted on the question of adopting or rejecting, were all framed in the New England states of Massachusetts, New Hampshire, Connecticut, and Maine. Provision had also been made elsewhere for consulting the people with reference to future constitutional changes, and many suggestions, proposals, and efforts had been made to apply the system in these outside states.

But the fact remains that less than one-fourth of the state constitutions during the first forty-five years of our national existence were actually voted on by the people, and that the policy of Congress as expressed through its enabling acts made that system practically impossible in the newly admitted states.

A second period covers the decade between 1821 and 1831, and is a period of transition. It begins with the adoption of the second New York constitution, which not only established popular ratification in the Empire State, but became the model for many of those farther west. The period ends with the adoption of the second Virginia constitution, which performed a like office for the states to the south. During this decade the field was evenly divided between the two methods of constitution-making. Six commonwealths effected or attempted changes in their fundamental codes — three by consulting the people and three without, but the three former were the more influential.

The third period covers about forty years, and lasts from the enactment of the Delaware constitution in 1831 down to the close of the reconstruction era. In this period popular ratification becomes general. The epoch is one which includes the culmination of the democratic movement in the states and the adoption by Congress of the policy of requiring new states to submit their constitutions to the people. During this whole period only two permanent<sup>1</sup> state constitutions — that of Mississippi in 1832 and Arkansas in 1836 — were adopted without receiving or recognizing<sup>2</sup> popular ratification. At the close of this period only one unratified state constitution — that of Delaware — remained, and the system of submitting the constitutions to a popular vote had apparently become not only all but universal, but also permanently established among the states.

And while this movement for popular ratification had been in progress, the system itself had been undergoing a process of evolution. Many of the first state constitutions were apparently designed to be permanent. No provision was made for their alteration, and much doubt was thereby thrown on the early attempts to that end. Such instruments as did authorize revision provided a system at once cum-

<sup>1</sup> The abortive reconstruction instruments which failed to receive recognition by Congress are not considered.

<sup>2</sup> The Florida constitution may not have been submitted, but it distinctly provides for submission.

brous and slow like the Massachusetts method of amendment by convention only, or the Connecticut plan of requiring approval by two successive legislatures. But, in course of time, these systems gave place to simpler and more direct modes of consulting the people. In some states the plan of appealing to the electors periodically has been a favorite one, while in others the submission of amendments by a majority vote of a single legislature and their ratification by a majority of those voting has been utilized to such an extent that other methods have proved unnecessary. The latest improvement is the popular constitutional initiative.<sup>1</sup> Thus the evolution of constitution-making in the United States has kept pace with, if indeed it has not actually outstripped, the progress of the nation along other lines. Few contrasts could be more striking than that which exists between the system of constitution-making in vogue during the first year of American independence and that which prevails at the beginning of the twentieth century.

When one comes to summarize the results of the long struggle for popular ratification and to estimate its effect upon those communities which have made it a part of their public law, one is likely to notice first of all how it has contributed to the permanence of those constitutions to which it has been applied.

"A general survey of this branch of our inquiry," says Bryce,<sup>2</sup> "leads to the conclusion that the peoples of the several States, in the exercise of this their highest function, show little of that haste, that recklessness, that love of change for the sake of change, with which European theorists, both ancient and modern, have been wont to credit democracy; and that the method of direct legislation by the citizens, liable as it doubtless is to abuse, causes, in the present condition of the States, fewer evils than it prevents."

In this respect the predictions of its opponents have signally failed.

The convention debates<sup>3</sup> of the period when the principle of popular ratification was first under discussion, and especially when attempts were first made to facilitate the submission of amendments, abound in prophecies that this would lead only to frequent and ill-advised changes of the fundamental law. But the contrary has proven to be true. Of the ten constitutions proclaimed during the first two years of American independence the two earliest were displaced

<sup>1</sup> *Michigan*, Art. XVII; *Oklahoma*, Art. V; *Oregon*, Laws 1903, p. 244.

<sup>2</sup> "The American Commonwealth" (2d Ed.), I, 457.

<sup>3</sup> Cf. Debates of the Pennsylvania Convention of 1837.

within two years, barely one-half survived the eighteenth century, and most of these soon became the objects of popular dislike and attack, from which they were saved with difficulty. The ephemeral character of the French constitutions has become proverbial,<sup>1</sup> and we shall see how France has been deprived of the benefits of a real popular ratification. Her people have had the shadow but not the substance of submission.

Note, however, the contrast where the people have had the largest possible share in the process. The one American constitution of the revolutionary period which has lasted until the present day is that of Massachusetts, in making which the electors participated to an extent never surpassed before or since. Nor is this an isolated instance. States like Maine and Wisconsin which retain their original constitutions after a long period, are states in which the people were carefully consulted at every step, and given full opportunity then and since to make changes in the fundamental law. And the reason for the permanence of instruments adopted in this way is not far to seek. When the electors are allowed to exercise their prerogatives, and have done so, the issues are settled, and the verdict is apt to be for a long time accepted as conclusive. But when the power to proclaim a constitution has been assumed and exercised by a small body of men like a convention, there has been no opportunity to determine whether the result is satisfactory to a majority of the people, and there is always likely to be found an element refusing to accept it as such, and agitating for a change.

"By the popular vote upon constitutional measures," observes Borgeaud,<sup>2</sup> "the two essential conditions of an amendment procedure, so hard to harmonize, yet indispensable, are attained; namely, the overcoming, on the one hand, of the rigidity of written texts, by facilitating amendments, and on the other the stability and prestige of the constitution. If the first of these conditions is fulfilled, the principal defect which the partisans of an exclusively customary public law find in written constitutions is corrected, and if the second is fulfilled, the character which constitutes their principal merit, is preserved. In this way the advantages of the English system are secured and the institutions of the demo-

<sup>1</sup> "Have you a copy of the French constitution?" was asked of a bookseller during the second French Republic. "We do not deal in periodical literature," was the reply.

"In the preceding century a similar question was answered by the offer of the *Almanach Royal*." — Foster, "Commentaries on the Constitution of the United States," 1.

<sup>2</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., Chicago, 1895), 346.

cratic state obtain a fundamental guarantee which that system would be powerless to give. This twofold merit answers the obviously characteristic need of the times; ceaseless and rapid progress, effected without violence and firmly securing its achievements by a powerful, universally respected law."

It is hardly too much to claim the constitutional convention as a product of the movement for popular ratification. For while that body has often met and labored without calling upon the people, still, in its origin, it seems to be directly connected with popular constitution-making. We have seen how the first suggestion of such a body came from Sir Harry Vane the Younger, as a culmination of the Puritan democratic movement in England, following the proposed "Agreement of the People," which provided for popular approval.<sup>1</sup> In America, legislatures, as a rule, and not conventions framed those constitutions of the revolutionary period which were proclaimed without submission to the people. But in Massachusetts, whose previous political history had rendered submission a necessary step in constitution-making, the voters rejected a proposed constitution, mainly, as we have seen, because it was not framed by a convention. The most memorable of all American state constitutional conventions was thus a direct result of the movement for a popularly ratified fundamental code. And from that time on the advocates of submission in every state sought to realize their purpose through the calling of a constitutional convention which should be required to refer its work to the people. Had it accomplished nothing else, this movement for popular ratification would have been one of the most fruitful phases of institutional history. Of the institution which has come out of it — the constitutional convention — a thoughtful observer<sup>2</sup> has said: —

"Through the hundred years of national existence it has received little but favorable criticism from any quarter. It is still an honor to have a seat in it. The best men in the community are still eager or willing to serve in it, no matter at what cost to health or private affairs. I cannot recall one convention which

<sup>1</sup> *Ante*, Chap. VI.

<sup>2</sup> E. L. Godkin, "The Decline of Legislatures," *Atlantic Monthly* (1897), LXXX, 52. Cf. the following from Bryce, "The American Commonwealth" (2d Ed., Chicago, 1890), I, 456: "The appointment of a Constitutional Convention is an important event, which excites general interest in a State. Its functions are weighty and difficult, far transcending those of the regular legislature. Hence the best men in the State desire a seat in it, and, in particular, eminent lawyers become candidates, knowing how much it will affect the law they practice. It is therefore a body superior in composition to either the Senate or the House of a State. Its proceedings excite more interest; its debates are more instructive; its conclusions are more carefully weighed."

has incurred either odium or contempt. Time and social change have often frustrated its expectations or have shown its provisions for the public welfare to be inadequate or mistaken, but it is very rare indeed to hear its wisdom and integrity questioned. In looking over the list of those who have figured in conventions of the State of New York since the Revolution, one finds the name of nearly every man of weight and prominence; and few lay it down without thinking how happy we should be if we could secure such service for our ordinary legislative bodies."

But probably the most important result of submitting constitutions to a popular vote is its educational influence upon the electorate. The familiarity of the American voter with constitutional questions as compared with those of other nationalities is well known, and the reason is not far to seek. When the voter became a legislator and a constitution-maker he received a new stimulus to familiarize himself with the subject-matter of laws and constitutions. Moreover, an electorate whose direct sanction is necessary to the enactment of the state's fundamental code is likely to feel a higher sense of responsibility and a more vital and personal interest in the state's welfare. And this is a phase of the subject whose importance can hardly be overestimated.

"The better constituted a state is," declares Rousseau,<sup>1</sup> "the more do public affairs outweigh private ones in the minds of the citizens. There is, indeed, a much smaller number of private affairs, because the amount of the general prosperity furnishes a more considerable portion to that of each individual, and less remains to be sought by individual exertions. In a well-conducted city-state every one hastens to the assemblies; while under a bad government no one cares to move a step in order to attend them, because no one takes an interest in the proceedings, since it is foreseen that the general will will not prevail, and so at last private concerns become all-absorbing. Good laws pave the way for better ones; bad laws lead to worse ones. As soon as any one says of affairs of the state, 'Of what importance are they to me?' we must consider that the State is lost."

Attempts have been made, not, indeed, without show of plausibility, to prove that the American elector fails to appreciate the importance of his function in constitution-making. Thus Judge Simeon E. Baldwin, speaking of a state where submission has been followed from the first says:<sup>2</sup> —

<sup>1</sup> "Contrat Social" (Trozer's Trans., London, 1895), Chap. XV, 186, 187.

<sup>2</sup> The Three Constitutions of Connecticut, New Haven Historical Society Papers (New Haven, 1894), V, 241. See for a similar line of argument against the Swiss Referendum; Hart, "Vox Populi in Switzerland," *The Nation*, LIX, 193-194; Deploige, "The Referendum in Switzerland" (Trevelyan's Trans., London, 1898), 289.



"Experience shows that much less interest is taken by the people in propositions for constitutional amendments than in elections to office. The personal element is always wanting, and, generally, that of party advantage.

"The strife between Hartford and New Haven for holding the state capital was of special interest to every citizen, and great efforts were made to call out a full vote on the part of each, yet a fifth of the electors who cast their ballots for state officers in 1873 cast none on the constitutional amendment. And the change to biennial elections, in 1884, was carried by little more than a fourth of those who took part in the general election, the total vote for state officers being considerably more than double that cast on the proposed amendment. The prohibition question has excited as much interest as any not connected with the immediate success of one of our great political parties, but at the decisive vote in 1889, only 72,746 ballots were cast, though those for governor at the last preceding state election numbered 154,226, out of a total registry of 167,529.

"These figures tend to show that the plan of amending the constitution by a *referendum* to the people is less likely to secure their interest in the work than that of acting by their delegates in a constitutional convention."

The numerous unsuccessful attempts at submission in Delaware have already been referred to, though the figures were not given. In 1887, out of a total electorate of over 31,000, less than one-half took the trouble to vote on the question of calling a convention. In 1891, when the voters appear to have increased to 35,000, there were still less than fifty per cent who cast their ballots.<sup>1</sup>

In Nebraska, in 1896, the electors were invited to vote on no less than twelve amendments to the constitution. The total vote for the office of governor in that year was 217,768, while on the very important amendment relating to the increase in the number of Supreme Court judges, there are reported as having been cast only 122,475, or about sixty-one per cent of those cast for gubernatorial candidates.<sup>2</sup> Indeed, proposed amendments have been submitted in that state in all but two or three of the even years since 1881,<sup>3</sup> and until the present decade only one of these was declared adopted, though the trend is manifestly toward greater popular interest<sup>4</sup> and

<sup>1</sup> Oberholtzer, "The Referendum in America" (2d Ed.) 135; McPherson's "Handbook, 1888 (72); 1892 (136).

<sup>2</sup> See *Tecumseh National Bank v. Saunders*, 51 Neb. 802.

<sup>3</sup> See an article by Judge Charles B. Letton in the *Omaha Bee*, October 5, 1902.

<sup>4</sup> On the amendment providing for a state railway commission, submitted Nov. 4, 1906, the favorable vote was 147,472 out of 194,692; but this result was reached by counting as favorable all "straight" party votes (all political parties having declared for the amendment) pursuant to Nebraska Laws, 1901, Chap. 29, the validity of which was upheld by the Supreme Court in *State v. Winnett*, 110 N. W. Rep. 1113, following *State v. Laylin*, 69 Ohio St. Important amendments were likewise overwhelmingly adopted in 1908.

most of the rejected amendments received a majority of the votes cast thereon, being lost by reason only of the constitutional requirement of a majority of all votes cast at the election.

Moreover there were qualifying circumstances in most of these cases. Thus the Delaware and at least one of the Connecticut instances were special elections, which hardly ever afford a fair test of the real interest of the voter.

"It has been found," says a writer<sup>1</sup> on this subject, "that it is impossible to poll a full vote at special elections, whether for constitutional amendments, city charters, authorizations of bond issues, filling official vacancies or anything else; but when an amendment is submitted at a general election, about two-thirds, as a rule, of those who vote for the heads of the tickets, express their opinions upon it."

A light vote on constitutional amendments may also frequently be explained by the comparative unimportance of some, or, on the other hand, by the strong probability of their adoption on account of their general acceptance, or for some other reason.

In some quarters the electors appear to have manifested an interest in constitutional questions considerably greater than in the states above mentioned. Thus in California<sup>2</sup> it seems that in a period of a dozen years, during which some twenty-eight amendments were submitted, an average of about two-thirds of those voting at the election availed themselves of their right to pass upon these proposed changes in the fundamental law. On the question of extending the franchise to women, which was submitted at a presidential election, 83.4 per cent of those voting for presidential candidates registered their choice, while the lowest constitutional vote during the period was 39.4 per cent, which was cast on an amendment to which there was little opposition.

At the general election in June, 1906, the vote on constitutional amendments in Oregon ranged from two-thirds to seven-eighths of that cast for officials; in 1908 it was even greater.<sup>3</sup>

<sup>1</sup> S. E. Moffett, "The Constitutional Referendum in California," *Political Science Quarterly*, XIII, 1, 14.

<sup>2</sup> Id. Mr. Moffett appends a table showing the percentage of the total vote cast on amendments as follows: 1884, 79.3; 1886, 68.6; 1890, 39.4; 1892, 62.5; 1894, 64.6; 1896, 68.2. Cf. the same writer's "Suggestions on Government" (Chicago, 1894), Chap. XVI.

<sup>3</sup> The vote for governor in 1906 was 96,715, while the vote cast on the equal suf-

In Texas also and other states of the South and West the figures reveal, on the part of the electorate, an increasing interest in constitution-making, as well as other phases of direct popular action.<sup>1</sup> But that this interest should be less lively than that usually manifested in the election of public officials is not strange. Direct action of the people in the making of laws fell into disuse among most modern races, as we have seen early in their history, and its revival is comparatively recent. Applied to state constitutions, it has come into general use within a half century. Popular election of officials, on the other hand, is a function of the ancient folkmoot which has never disappeared. In England, as afterward in America, it has been continuously exercised from the earliest period, and it is only natural that an electorate thus schooled should be attracted by a chance to vote for candidates more even than by the opportunity to express its views of constitutions or amendments. But as the latter function becomes better understood and its exercise more frequent, it is not too much to expect the privilege to be more highly prized and more generally availed of, with a corresponding educational influence upon the elector.

It is sometimes urged that modern legislation is a process too complex to be carried on successfully by the average voter. Indeed, this is one of the stock objections to the Swiss referendum. Thus M. Simon Deploige, in his indictment of that system observes:<sup>2</sup> —

frage amendment, which failed of adoption, was 83,977. See *Review of Reviews*, XXXIV, 143, 176; Haynes, "The Education of Voters," *Political Science Quarterly*, XXII, 494. Two years later, when nineteen distinct proposals were submitted, the vote on that relating to equal suffrage reached more than ninety-five thousand, while the highest vote for candidates from the whole state was about one hundred and twelve thousand. *Equity*, X, 87, 88, 112.

<sup>1</sup> E.g. the "Direct Primary" and "The Referendum." In this connection the tendency to enlarge constitutions by including and submitting in the form of amendments provisions formerly considered as belonging to the field of general legislation has been the occasion of much adverse comment. See Wilson, "The State," sec. 896; Eaton, "The Late Constitutional Convention of South Carolina," *American Law Review*, XXXI, 198. But it appears to have been overlooked that this has afforded the electorate a wider scope for the exercise of its legislative power.

<sup>2</sup> "The Referendum in Switzerland" (Trevelyan's Trans., London, 1898), 288. President A. Lawrence Lowell of Harvard University has claimed that the difficulties would be multiplied if the system were adopted in the United States. "The relations of the executive and legislative in Switzerland," he says, "are very different from what they are in this country, for a great deal of what we should consider legislation falls into the province of the Swiss executive. The laws are passed in a comparatively simple and general form, and the executive has authority to complete their details

"The elector who writes Aye or No on his ballot-paper performs an act, the apparent simplicity of which has attracted the democrats, but this act is, as a matter of fact, a very complex one. It requires that each voter should be able not only to understand why legislation is necessary, but also should be able to judge whether the law in question is adequate to meet the case. Nothing effectual has as yet been devised which would assist the elector in forming a personal opinion on such a subject."

But it may well be asked if this is not, after all, an indictment of popular government in general rather than merely of popular legislation, and whether as a matter of fact the people are not now, in the last analysis, required to determine these questions, but to do so under a system which disguises and conceals the fact that they are involved? When the American electorate is called upon to choose a president or a congress, or when the British voter is asked to register his choice for members of parliament, the result usually determines the fate of important measures vitally affecting the national policy. But these are not the questions most discussed in the campaign before the people. Instead of simplifying the voter's task, the present system too often complicates it by confusing the merits of a question with other considerations, like the personality of candidates, or the necessity of party success.

"It is often said," observes Mr. Lecky,<sup>1</sup> who certainly cannot be suspected of predilections toward democracy, "that there are large classes of questions on which such a popular opinion could be of little worth. To this I have no difficulty in subscribing. It is very doubtful whether a really popular vote would have ratified the Toleration Act in the seventeenth century, or the abolition of the capital punishment of witches in the eighteenth century, or Catholic Emancipation in the nineteenth century, or a crowd of other measures that might be enumerated. It is now, however, too late to urge such an argument. Democracy has been crowned king. The voice of the multitude is the ultimate court of appeal, and the right of independent judgment, which was once claimed for the members of Parliament, is now almost wholly discarded. If the electorate is to judge policies, it is surely less likely to err if it judges them on a clear and

and provide for their application by means of decrees or ordinances. Partly for this reason, and partly on account of the small size of the country, the number of laws passed in a year is far less than with us. . . . Is it not evident that while a people may vote intelligently on five or ten laws a year, it is absurd to suppose that they could vote intelligently on four hundred? How could they be expected to consider independently each one of four hundred different measures? Is it not clear what they would do? They would not attempt to consider each law separately, nor even to understand it at all, but they would vote on them all as their party leaders directed." — "The Referendum in Switzerland and in America," *Atlantic Monthly*, LXXIII, 523, 524.

<sup>1</sup> "Democracy and Liberty," I, 289, 290.

distinct issue. In such a case it is most likely to act independently and not at the dictation of party wirepullers."

But whatever may be said concerning the competency of the average man to pass on general legislation, the American system of submitting constitutional questions to a popular vote will certainly not suffer by comparison with other systems. No monarchical country can point to such achievements in constitutional development. In substance and contents the American constitutions are certainly the peers of any others, while in practical operation they have no rivals. Nowhere else are written constitutions so effective, so scrupulously observed by officials, so generally respected and jealously guarded by citizens. The framers of the first popularly adopted American state constitution declared, as we have seen, their intention to establish "a government of laws and not of men." And the most rapid approach toward the realization of that ideal has occurred while the people were being called upon to share in the making of their fundamental codes. In this the words of William Penn, written more than two centuries ago, find striking confirmation.

"And as paradoxical as any may please to think it," he says,<sup>1</sup> "'tis the great interest of a Prince that the People should have a share in the making of their own laws; Where 'tis otherwise, they are no Kings of Free-men, but Slaves, and those their enemies for making them so. *Leges nulla alia causa nos tenent, quam quid iudicio populi receptae sunt*: 'The Laws,' saith Ulpian, 'do therefore oblige the people, because they are allowed of by their judgment.' And Gratian, in "Dec. Distinct." 4: *Tum demum humanae leges habent vim suam, cum fuerint non modo institutae, sed etiam firmatae approbatione communitatis*; 'It is then, saith he, 'that human laws have their due force, when they shall not only be devised, but confirmed by the approbation of the people.'

"1. It makes men diligent, and increaseth Trade, which advances the revenue. For where men are not free, they will never seek to improve, because they are not sure of what they have, and less of what they get.

"2. It frees the Prince from the jealousy and hate of his people; and consequently, the troubles and danger that follow; and makes his province easy and safe.

"3. If any inconvenience attends the execution of any law, the Prince is not to be blamed; It is their own fault that made it."

<sup>1</sup> "Select Works of William Penn" (England's Present Interest Considered), 376 *et seq.*

## C

### POPULAR LEGISLATION IN THE UNITED STATES

#### CHAPTER XXVII

##### THE STATUTORY REFERENDUM AS TO PARTICULAR MEASURES

WHILE the principle of popular ratification was becoming an established part of the process of adopting and amending state constitutions in America, steps were likewise being taken to employ it in the enactment of ordinary laws not purporting to be parts or amendments of constitutions.

But while these two phases of popular participation in law-making are in their nature distinct, they were directly connected in origin. The statutory referendum was really the revival of a colonial practice which had fallen into disuse except where perpetuated through the agency of the town meeting. The constitutional referendum, however, preserved the form and rendered the revival easy. It is not strange, therefore, that we find the statutory referendum first employed in the nineteenth century in a state where it had been in use during the colonial era, nor that its reappearance was as a phase of popular constitution-making. There was no imitation of Swiss or other foreign models, then,—merely a natural transition from one form of the referendum to another. So imperceptibly, indeed, did the change take place that the new system had spread and been employed in most of the states, for at least some measures, before its full significance was even noticed. It will be profitable to trace its history in certain of the states where it has reached its greatest development, and where it was first applied to each of the various classes of measures which are now recognized as belonging to its field.

We have seen<sup>1</sup> how in Maine, in the early years of the nineteenth century, the voters in their town meetings considered and determined

<sup>1</sup> *Ante*, 197 *et seq.*

the question of separation from Massachusetts under a reference from the General Court of that state. This, while not strictly an amendment to any existing constitution, was yet, in a sense, a constitutional question.

To the step thus taken, which, although something of a departure, was, nevertheless, quite in line with her traditions, an impetus was given in Massachusetts by the second amendment adopted by the Constitutional Convention of 1820, providing for the establishment of municipal governments, but only "with the consent and on the application of a majority of the inhabitants . . . present and voting." The very next year the General Court passed "an act establishing the city of Boston"<sup>1</sup> providing, however, that the act should be void "unless the inhabitants . . . shall, by written vote, determine to adopt the same within twelve days."<sup>2</sup> At the same time the General Court passed "an act to regulate the administration of justice within the county of Suffolk,"<sup>3</sup> and this was declared to be of no effect unless the charter above mentioned "shall be accepted by the inhabitants of the town of Boston, pursuant to the provision therein made."<sup>4</sup>

The legislation thus enacted, and which was subsequently approved in the manner designated, constitutes probably the earliest instance of a provision for popular ratification in a legislative municipal charter.<sup>5</sup> It also provided the first subject for a judicial test of the validity of such legislation. In a case<sup>6</sup> which came before the Supreme Judicial Court of Massachusetts in 1826, the act last mentioned was directly assailed because of its provision as to the manner of taking effect.

"This objection, for aught we see," said the court, per Parker, J., "stands unsupported by any authority or sound argument. Why may not the legislature make the existence of any act depend upon the happening of any future event? Constitutions themselves are so made. . . . We see no impropriety, certainly no unconstitutionality, in giving the people the opportunity to accept or reject such provisions."

<sup>1</sup> General Laws of Massachusetts, vol. II, Chap. 110, p. 588.

<sup>2</sup> Id. sec. 31.

<sup>3</sup> Id. Chap. 109, p. 583.

<sup>4</sup> Id. sec. 17.

<sup>5</sup> Such provisions have since become common in Massachusetts. The Supreme Judicial Court having held that such charters could not be provided by general law (*Larcom v. Olin*, 160 Mass. 102), a specific act is passed for each municipality, but usually with provisions for popular acceptance. See Acts and Resolves, 1896, Chaps. 261, 366, 379, 438, 441; 1897, Chaps. 172, 239, 283.

<sup>6</sup> *Wales v. Belcher*, 3 Pick. (Mass.) 508.

Thus to Massachusetts, which gave to the world the first popularly ratified state constitution, belongs the further distinction of having revived and perpetuated <sup>1</sup> the popular legislation of her colonial era.

Some other states, which were without the machinery furnished by the town meeting, began about this same period to confer upon the people the right to legislate directly upon one of the subjects most frequently considered in town meetings — the public school. A Maryland statute <sup>2</sup> of 1826 provided for the establishment of a system of primary public instruction, but also provided that the act should not go into effect in any county unless a majority of those voting therein at an ensuing election should have declared in its favor.

### *Pennsylvania*

About a decade later Pennsylvania organized its common school system by a series of acts,<sup>3</sup> which left it to the people of each township or district to say whether or not the law should become operative therein. Commencing with this school legislation, provisions for con-

<sup>1</sup> "This practice has been not infrequent here from an early date, both in local statutes and statutes concerning corporations, and has been held constitutional." — Opinion of Barker, J., 160 Mass. 600.

This was an advisory opinion in answer to a query of the House of Representatives as to whether it would be constitutional to grant municipal suffrage to women, conditioned upon the acceptance of the act generally or locally by the voters or by those thereby enfranchised. Four of the justices, while recognizing the doctrine that matters of local legislation might be referred to the voters of the locality, were unable to consider the suffrage as of that class and answered in the negative. Of the three remaining justices one answered partly in the affirmative and two entirely so, one of whom, Mr. Justice Holmes, now of the Federal Supreme Court, declared that the contrary view seemed "an echo of Hobbes' theory that the surrender of sovereignty by the people was final."

Ballots are now provided for each town meeting to vote on the question of granting liquor licenses. Suppl. to Pub. Stats., 1889-1895, 885, sec. 282.

Certain street railways may operate as common carriers if authorized by a two-thirds vote in the towns through which they pass. Massachusetts Acts and Resolves, 1896, Chaps. 409 (8), 437.

In 1899 the General Court passed an eight-hour law (Acts and Resolves, 1899, Chap. 344), providing that it should "not take effect in any city or town until accepted by a majority of the voters," and another act similarly to become effective, permitting certain street-car tracks in Boston to be replaced. Id. Chap. 398, sec. 3.

<sup>2</sup> Maryland Laws, 1825, Chap. 162.

In *Burgess v. Pue*, 2 Gill (Md.) 11, the validity of this act was assumed by the Court of Appeals, although the point was not directly in question.

<sup>3</sup> Act of April 15, 1835; Parke and Johnson's Digest of the Laws of Pennsylvania, I, 185; Act of June 13, 1836, Id. II, 547.



sulting the people are not uncommon in the Keystone State. The tendency was doubtless promoted by the movement resulting in the constitution of 1838, with its provisions for popular amendment, but the voters were invited to act on other than constitutional questions and without express constitutional authority. In 1842 the legislature empowered supervisors of highways to subscribe for capital stock in turnpike companies to such an amount "as may be agreed upon by the tax payers of said respective townships."<sup>1</sup> Four years later an act was passed "authorizing the citizens of certain counties to decide by ballot whether the sale of . . . liquors shall be continued."<sup>2</sup> This was declared unconstitutional by the Supreme Court in the following year on the ground that it attempted to delegate legislative power,<sup>3</sup> and a rather strained effort was made to distinguish the act from the school legislation of the previous decade which was conceded to be valid. In 1847 the question of dividing a certain township was submitted to the voters thereof,<sup>4</sup> and this was upheld by the Supreme Court,<sup>5</sup> distinguishing its former decision on the ground that the power now delegated was not legislative. An act,<sup>6</sup> passed in 1870, left it to the "citizens" of Philadelphia to determine by ballot a site for its public buildings, and the constitution adopted three years later required a referendum to relocate the state capital,<sup>7</sup> to incur public debts beyond a certain limit,<sup>8</sup> or to adopt a city charter.<sup>9</sup> In 1877 the legislature enacted a statute authorizing the voters of a county to determine the question of erecting a poor-house,<sup>10</sup> and the following year another imposing a tax on dogs for the purpose of paying damages to sheep owners, but providing that the act should not become operative in any county until ratified by a majority of its electors.<sup>11</sup> It seems difficult to distinguish this in principle from

<sup>1</sup> Pennsylvania Laws, 1842, 233, providing for a vote on the question at the written request of twelve tax-payers.

<sup>2</sup> *Id.*, 1846, 248.

<sup>3</sup> "What is this more or better than the *projet* of a law to be submitted for the sanction of a distinct and independent tribunal, whose will is to determine its future existence or continued nonentity." — *Parker v. Comm.*, 6 Pa. St. 527.

<sup>4</sup> Pennsylvania Laws, 1847, 256. The method of submission was somewhat indirect. The legislature appears to have provided (though not in the act itself) for the boundaries of a new township to be carved out of the old, and the voters were asked to decide whether or not the new one should be continued.

<sup>5</sup> *Comm. v. Judges*, 8 Pa. St. 91.

<sup>6</sup> Pennsylvania Laws, 1870, 677.

<sup>7</sup> Art. III, sec. 28, borrowed apparently from Texas.

<sup>8</sup> Art. IX, sec. 8, borrowed from Rhode Island.

<sup>9</sup> Art. XV, sec. 1, borrowed from Massachusetts.

<sup>10</sup> Pennsylvania Laws, 1877, 40.

<sup>11</sup> *Id.*, 1878, 198.

the act declared unconstitutional in the first of the decisions above cited, even on the ground mentioned in the second, but the law of 1878 seems not to have been challenged in the courts. An act,<sup>1</sup> passed in 1885, authorized a majority of the electors of any county to render the "fence law" inoperative therein by voting for its repeal, but this was held<sup>2</sup> repugnant to the constitutional inhibition of a "local or special law," though the Supreme Court expressly declined to discuss the question whether it also effected a delegation of a legislative power. Provisions for leaving it to the people of boroughs to decide the question of providing fire protection,<sup>3</sup> water-works,<sup>4</sup> and electric light plants,<sup>5</sup> have appeared in recent years.

### *Rhode Island*

The constitution of Rhode Island, adopted in 1842, revived one of the ancient privileges of its people by requiring<sup>6</sup> their consent, except in certain emergencies, before debts above fifty thousand dollars could be incurred by the state or its credit pledged. This precedent, as we shall see, was widely followed, and similar provisions are now found in the constitutions of more than one-third of the states.<sup>7</sup> Prior<sup>8</sup> to 1844 the Rhode Island legislature applied the referendum principle in passing a general law for impounding stray live-stock, but providing<sup>9</sup> that "any town may, at a legal meeting, pass a vote exempting itself or any part thereof from the operation of this act," or<sup>10</sup> extending its provisions to certain other animals. By a somewhat similar method the legislature, in 1853, effected an indirect submission of a prohibitory liquor law to the people. In order to avoid the force of certain decisions<sup>11</sup> in other states, by which legislation of the same general purpose had been annulled as a delegation of legislative power, a complete act<sup>12</sup> was here passed, and the electors in the towns were asked to express their will, a provision being added that in case of an adverse vote the law should be inoperative.<sup>13</sup> The vote

<sup>1</sup> Pennsylvania Laws, 1885, 142.

<sup>2</sup> *Frost v. Cherry*, 122 Pa. St. 417.

<sup>3</sup> Brightly's Purdon's Digest, 241.

<sup>4</sup> Pennsylvania Laws, 1885, 163.

<sup>5</sup> Id., 1891, 90, 91, 92.

<sup>6</sup> Art. IV, sec. 13. Poore, "Charters and Constitutions," II. 1607.

<sup>7</sup> Oberholtzer, "The Referendum," 183 *et seq.*

<sup>8</sup> The act appears in Rhode Island Public Laws, (1844) 369, but the date of passage is not given.

<sup>9</sup> Id. sec. 6.

<sup>10</sup> Id. sec. 7.

<sup>11</sup> Especially *Rice v. Foster*, 4 Harr. (Del.) 479, *Parker v. Comm.*, 6 Pa. St. 507.

<sup>12</sup> Rhode Island Acts and Resolves, 1853 (Jan. Sess.) 232.

<sup>13</sup> Id. sec. 19.

was favorable to the measure, and it was subsequently upheld by the Supreme Court,<sup>1</sup> though that tribunal indicated by way of *obiter dicta* that the contrary result could not have had the effect of repealing the act.

More recently the principle has been extended by authorizing municipal electors of any town or city to vote on the exemption of manufacturing property from taxation,<sup>2</sup> and on the acceptance of a charter.<sup>3</sup>

### *Texas*

During the period just reviewed, the people of Texas were making some interesting experiments with the referendum. The constitution of the Texan republic, adopted in 1836, provided<sup>4</sup> that "no new county shall be established unless it be done on the petition of one hundred free male inhabitants." The state constitution, adopted in 1845, contained a clause<sup>5</sup> designed "to settle permanently the seat of government" by submitting the question to the people. The present instrument of 1876 is most prolific in provisions for the referendum which is required in order to locate the state university<sup>6</sup> and the college for colored youth;<sup>7</sup> to divide counties,<sup>8</sup> relocate county seats,<sup>9</sup> levy local taxes for the construction of public works,<sup>10</sup> and the support of schools,<sup>11</sup> or to prohibit the sale of intoxicating liquors in counties or subdivisions thereof.<sup>12</sup> The last provision has been re-enforced by elaborate legislation,<sup>13</sup> which has been declared valid by the courts,<sup>14</sup> and frequently applied so that the Texas "local option law" is not only in force throughout a large portion of that state, but has been the model of extensive legislation elsewhere.

The same constitution empowered<sup>15</sup> the legislature to enact "laws for the regulation of live stock," etc., but provided that any such as

<sup>1</sup> *State v. Copeland*, 3 R.I. 33.

<sup>2</sup> Rhode Island Public Laws, 1891-1892, Chap. 1088.

<sup>3</sup> *Id.* 1897, Chap. 516, sec. 28.

<sup>4</sup> Art. IV, sec. 11.

<sup>5</sup> Art. III, sec. 35.

<sup>6</sup> Art. VII, sec. 10. The question was submitted in 1881.

<sup>7</sup> Constitution, Art. VII, sec. 14.

<sup>8</sup> Art. IX, sec. 2.

<sup>9</sup> Art. IX, sec. 1.

<sup>10</sup> Art. XI, sec. 7.

<sup>11</sup> Art. XI, sec. 10.

<sup>12</sup> Art. XVI, sec. 20.

<sup>13</sup> *Texas General Laws*, 1876, Chap. XXXIII.

<sup>14</sup> *Holley v. State*, 14 Tex. App. 505; *Ex parte Lynn*, 19 Id. 293; *Steele v. State*, 14 Tex. App. 425.

<sup>15</sup> Art. XVI, sec. 23.

<sup>16</sup> Art. XI, sec. 7.

<sup>17</sup> Art. XI, sec. 10. This was supplemented by an act authorizing an additional tax for school buildings to be levied.

were local should "be submitted to the freeholders of the section to be affected thereby." This has also been supplemented by legislation.<sup>1</sup>

### *Wisconsin*

The people of Wisconsin have enjoyed an unusually full experience with the referendum in ordinary legislation. As early as 1841, and while still a territory, its legislature authorized the electors of a county to locate its "seat of justice,"<sup>2</sup> those of a town to designate its polling place,<sup>3</sup> and those of various towns to accept or reject the acts incorporating them.<sup>4</sup> An act of 1846 referred the question of county division to the voters.<sup>5</sup>

The New England township was early implanted in Wisconsin, which has always been distinguished for its highly developed form of local government.<sup>6</sup> The township system was itself the subject of a referendum,<sup>7</sup> and the electors in the towns were clothed with extensive powers, including the levy of taxes for schools, roads and bridges, poor relief, and other charges,<sup>8</sup> and the enactment of by-laws.<sup>9</sup>

The first constitution of Wisconsin, adopted, as we have seen, after a careful consultation of the people, contained several provisions for the referendum, some of which had not appeared elsewhere. It provided for extending the right of suffrage, not by constitutional amendment, but "by law," which however, should not "be in force until . . . submitted to a vote of the people . . . and approved by a majority."<sup>10</sup> Advantage was taken of this in the following year, when the law was referred<sup>11</sup> and ratified. The constitution further required<sup>12</sup> the submission of the question of chartering banks and of general laws providing for such charters, and the people have voted upon the adoption of such laws more frequently in Wisconsin than in

<sup>1</sup> Texas General Laws, 1876, Chap. 98. The voters even decide "whether or not three barbed wires without a board or plank shall constitute a lawful fence in such county or subdivision." — Sayles' "Annotated Civil Statutes," II, sec. 500.

<sup>2</sup> Wisconsin Laws, 1840-1841, 77.      <sup>3</sup> Id., 1846, 22.

<sup>4</sup> Id. 136.

<sup>5</sup> Howard, "Local Constitutional History," 158.

<sup>6</sup> Id. 90, 91, 116.

<sup>7</sup> Wisconsin Laws, 1842, 65.

<sup>8</sup> Wis. Rev. Stats., 1849, Chap. XII, sec. 2. These have since been extended so as to include town buildings, libraries, the support of destitute veterans, and the erection of soldiers' monuments. Wis. Stats. (Sanborn and Berryman), secs. 776, 937. Cf. sec. 670.

<sup>9</sup> Wis. Rev. Stats., 1849, Chap. XII, sec. 3.

<sup>11</sup> Wisconsin Laws, 1849, Chap. 137.

<sup>10</sup> Wis. Const., 1848, Art. III, sec. 1, subdiv. 4.

<sup>12</sup> Wis. Const., Art. XI, sec. 5.

any other state.<sup>1</sup> Other clauses in the constitution require a referendum for the division of counties<sup>2</sup> and the removal of county seats.<sup>3</sup>

Independently of express constitutional sanction, the legislature in 1869 passed "an act establishing a board of Public Works in the city of Milwaukee,"<sup>4</sup> with a clause providing that it should be void unless the electors of that city "by vote determine to accept the same."<sup>5</sup> The validity of this act was challenged in the courts but upheld, the Supreme Court following the Vermont decisions in preference to those of New York and Delaware.<sup>6</sup>

Municipalities were empowered in 1897 by popular vote to extend aid in the construction of railroads;<sup>7</sup> in 1875, to establish and maintain high schools;<sup>8</sup> and in 1889 to determine whether intoxicating liquors should be sold within their limits.<sup>9</sup> In 1897, the legislature, in addition to submitting the new banking code,<sup>10</sup> also passed acts to regulate the nomination of candidates for office<sup>11</sup> and the granting of municipal franchises,<sup>12</sup> each providing that it should become operative in a municipality only when adopted by a majority of its electors after being submitted pursuant to a petition from ten per cent. The most conspicuous recent example of the referendum in Wisconsin was the adoption in 1904 of the direct primary law,<sup>13</sup> whose submission was the final stage in a legislative contest of years for a reformed nominating system.

The experience of the states above mentioned has been repeated in many others. Indeed, by the last quarter of the nineteenth century there were few in which the statutory referendum had not been

<sup>1</sup> Under this clause provisions were submitted in 1851, 1852, 1858, 1861, 1862, 1866, 1867, 1868, and 1876. Annotated Statutes of Wisconsin (1889), I, 1210, Reviser's note.

A banking code was submitted by the legislature of 1897 (Laws, 1897, Chap. 303) and ratified in 1898.

Acts relating to banking not submitted to the people were held void in *Van Steenwyck v. Sackett*, 17 Wis. 645; *Brower v. Haight*, 18 Id. 102; *State v. Hastings*, 12 Id. 47.

The act of 1866, which was submitted, was declared valid by the Supreme Court. *Smith v. Janesville*, 26 Wis. 291.

<sup>2</sup> Art. XII, sec. 7.

<sup>3</sup> Id. sec. 8. This was applied at the first session of the legislature. See Wisconsin Laws, 1848, 77.

<sup>4</sup> Wisconsin Private and Local Laws, 1869, Chap. 401.

<sup>5</sup> Id. 1889, Chap. 521.

<sup>6</sup> Id. sec. 37.

<sup>10</sup> Id. 1897, Chap. 303.

<sup>8</sup> State *ex rel.* Attorney-General v. O'Neill, 24 Wis. 149.

<sup>11</sup> Id. Chap. 312.

<sup>7</sup> Wisconsin Laws, 1872, Chap. 182.

<sup>12</sup> Id. Chap. 370.

<sup>9</sup> Id. 1875, Chap. 323.

<sup>13</sup> Id. 1903, Chap. 451.

employed in the adoption of some measure, while for certain subjects, particularly local measures, the expenditure of public money and the location of seats of government, the referendum had quite generally come to be considered the appropriate method. Nevertheless the widespread movement, originating mainly in the few states whose legislative history is reviewed above, was only partial and sporadic in its results. Its full development must be sought in another movement whose initial stage forms the subject of the ensuing chapter.

## CHAPTER XXVIII

### THE INITIATIVE AND REFERENDUM AS TO ANY MEASURE

WE have seen that neither the initiative nor the referendum is new even in America, that both were employed in colonial Rhode Island before the middle of the seventeenth century;<sup>1</sup> that the initiative, as early as the third year of the Revolutionary War, was embodied into the first Georgia constitution;<sup>2</sup> and that it was proposed and nearly adopted in the Pennsylvania convention<sup>3</sup> of 1837, and introduced in a modified form into the Virginia instrument<sup>4</sup> of 1850. The referendum has had a much more extensive history, being frequently employed in colonial times, especially in New England, and during the nineteenth century spreading into many states, particularly in local legislation, while the constitutional referendum, adopted in all save the single state of Delaware, has familiarized the American people with the practice of themselves ratifying their fundamental laws. But the revival and combination of the two systems in such a way as to include all legislation *are* recent.<sup>5</sup> Public interest in the subject appears to have been first aroused in our time by the publication, about a score of years since, of the works of Mr. (now Ambassador) Bryce,<sup>6</sup> and of Dr. Borgeaud,<sup>7</sup> whose luminous comparison of our institutions with those of the Swiss was a revelation to most Americans. More than ten years have now elapsed since the subject first passed from academic discussion to practical legislation, and it seems a fitting time to review the progress of the movement and estimate its results.

<sup>1</sup> *Ante*, Chap. VII.

<sup>3</sup> Proceedings and Debates, XII, 58, 84.

<sup>2</sup> Art. LXIII.

<sup>4</sup> Art. IV, sec. 5.

<sup>5</sup> This is even more true of England. So late as 1863 Mr. Freeman said: "Nobody has ever proposed that every adult male should vote in the making of laws, but only in the choosing of lawgivers." — "History of Federal Government," 72, note.

<sup>6</sup> "The American Commonwealth" (1888), I, 448 *et seq.*

<sup>7</sup> "Rise of Modern Democracy in Old and New England" (1894); "Adoption and Amendment of Constitutions" (1895).

### A. *Beginnings of the Movement*

The first formal adoption in America of the initiative and referendum as applicable to all legislation was inaugurated by a joint resolution of the legislature of South Dakota in 1897, proposing an amendment to the state's constitution.<sup>1</sup> It provided that

"The legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives except that the people expressly reserve to themselves the right to propose measures which measures the Legislature shall enact and submit to a vote of the electors of the state and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions)." <sup>2</sup>

The section further provides that not more than five per cent of the electors need petition to invoke its provisions, that the governor's veto power shall not be applicable thereto, and that the system shall apply to municipalities.<sup>3</sup>

<sup>1</sup> South Dakota Laws, 5th Sess., Chap. XXXIX.

<sup>2</sup> Id. sec. 2. The exception clause in brackets was afterward construed by the Supreme Court, in connection with other constitutional provisions, to include legislative acts passed with the emergency clause to which, it was held, the amendment did not apply. *State ex rel. Lavin v. Bacon*, 14 South Dakota 394. This, it will be seen, might curtail considerably the scope of the referendum, since the legislature might decide to insert an emergency clause in each act. The decision is based, however, upon the peculiar wording of the South Dakota constitution.

<sup>3</sup> South Dakota Laws, 1897, Chap. XXXIX, sec. 2.

In the same year, but a little more than a month later, the Nebraska legislature passed an act extending the referendum to any "municipal subdivision upon a vote of the electors which may be initiated by petition." Nebraska Laws, 1897, Chap. XXXII; Nebraska House Journal, 1897, 1160.

The Illinois legislature passed "an act providing for an expression of opinion by electors on questions of public policy at any general or special election." The initiative must be taken by ten per cent of the registered voters of the state or twenty-five per cent of those of a smaller subdivision. Illinois Laws, 1901, 198.

In 1905, the Texas legislature enacted an elaborate election law (Texas Gen. Laws, 1905, first called Sess. Chap. XI, sec. 142) which provided, *inter alia*, —

"Whenever delegates are to be selected by any political party to any state or county convention by primary election or primary convention, or candidates are instructed for or nominated; it shall be the duty of the chairman of the county or precinct executive committee of said political party upon application of ten per cent of the members . . . to submit at the time and place of selecting said delegates any proposition desired to be voted on by said voters and the delegates selected at that time shall be considered instructed for whichever proposition for which a majority of the votes are cast." De-



The proposal came before the people in November of the following year, and was adopted by a pronounced majority.<sup>1</sup> It required the legislature to "make suitable provisions for carrying [it] into effect,"<sup>2</sup> and at its ensuing session that body passed an act providing the method of invoking the privileges of the amendment in the case of state legislation,<sup>3</sup> and another making it applicable to municipal ordinances and resolutions.<sup>4</sup> For a long time its provisions were not utilized,<sup>5</sup> but a referendum was demanded of the legislative act of 1907 relating to divorce and it was ratified Nov. 3, 1908.<sup>6</sup>

### *Utah*

The next state to adopt the initiative and referendum was Utah. Its legislature in 1899 passed a joint resolution<sup>7</sup> proposing a constitutional amendment embodying the new system, but in different phraseology from that employed in the South Dakota provision. After reciting that the law-making power shall be vested in the people as well as the legislature, it provided that —

"The legal voters, or such fractional part thereof, of the state of Utah as may be provided by law, under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people for approval or rejection, or may require any law passed by the legislature (except those laws passed by a two-thirds vote of the members elected to each house of the legislature) to be submitted to the voters of the state before such law shall take effect."<sup>8</sup>

A subsequent clause made the same provision applicable to "any legal subdivision of the state," and "the law-making body" thereof.<sup>9</sup> The entire proposal was voted upon at the election in November, 1900, and adopted by a majority of nearly three to one.<sup>10</sup>

tails as to the manner of invoking the system are also provided, and have already been applied. See Referendum News, Vol. I, No. 8, p. 9.

<sup>1</sup> 23,816 as against 16,483. South Dakota Laws, 7th Sess., 1901, XII, note. Governor Lee, in his message to the legislature of 1899, closed as follows a passage devoted to praise of the new system: "The large plurality by which the amendment was ratified at the polls indicates how generally its simple provisions were understood and how popular they were with the masses who will be beneficiaries of their successful operation." South Dakota House Journal, 6th Sess. (Pierre, 1899), 131, 132.

<sup>2</sup> South Dakota Laws, 5th Sess. Chap. XXXIX, sec. 2. <sup>6</sup> *Arena*, XXXVIII, 400.

<sup>3</sup> Id. 6th Sess. Chap. 93.

<sup>7</sup> Utah Senate Jour. 3d Sess., 453.

<sup>4</sup> Chap. 94.

<sup>8</sup> Id.

<sup>9</sup> New York State Library Report, 1902, 939.

<sup>10</sup> Id.

<sup>11</sup> 19,219 as against 7786. Report of Utah Secretary of State, 1899-1900, 46.

Notwithstanding this rather emphatic expression of popular approval, the movement seems to have made as yet little further progress in Utah. Governor Wells, in his Message<sup>1</sup> of 1901, called attention to the fact that legislation was necessary in order to carry these provisions into effect, and it is apparent that this is even more true than in South Dakota, since by the express terms of the Utah amendment the time, conditions, and number requisite to invoke its provisions are left to be "provided by law." No such legislation, however, appears to have been enacted up to this time.

### *B. The System Extended*

In Oregon the movement toward the new system of legislation, while slower in maturing by reason of the constitutional requirement<sup>2</sup> of action by two successive legislatures, really began earlier than in Utah and has been much more fruitful of results. On February 6, 1899,<sup>3</sup> the governor approved a concurrent resolution<sup>4</sup> of both legislative branches proposing a constitutional amendment providing for the initiative and referendum in more elaborate phraseology than in either the South Dakota or Utah amendments, and containing most of the provisions of the former, though not including municipal legislation. The second step was taken at the session of 1901, when an act<sup>5</sup> was passed formally submitting the amendment to the voters. It came before them at the June election of 1902, and was ratified by a majority of about eleven to one.<sup>6</sup>

While the Oregon amendment was more complete in detail than any yet adopted, it nevertheless contemplated further legislation affecting procedure, and this was provided in 1903 by a comprehensive act<sup>7</sup> which applied not only to ordinary statutes but to constitutional amendments as well, thus greatly reducing the time required in procuring the adoption of the latter, and which permitted the distribution by the Secretary of State of literature bearing on the proposed amendments and furnished by the advocates and opponents thereof.<sup>8</sup>

<sup>1</sup> P. 39.

<sup>2</sup> Oregon Const., Art. XVII, sec. 1.

<sup>3</sup> The Utah resolution was passed on March 9 of the same year.

<sup>4</sup> Oregon Laws, 1899, 1129.

<sup>5</sup> Id. 1901, 4.

<sup>6</sup> 62,024 as against 5668, the total vote being 92,920; New York State Library Rep. 1903, 723.

<sup>7</sup> Oregon Laws, 1903, 244.

<sup>8</sup> Oregon Laws, 1903, p. 244, sec. 8. See a discussion of this feature by Haynes,

The amendment had yet, however, to run the gantlet of the courts. In the year last mentioned an action reached the Supreme Court in which the validity of the amendment was assailed on several grounds, one of which was that it violated that article of the Federal Constitution guaranteeing to each state "a republican form of government." The court in an exhaustive opinion upheld the amendment *in toto*, and as to the objection just mentioned, observed: <sup>1</sup> —

"The initiative and referendum amendment does not abolish or destroy the republican form of government or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power."

Once established as the law of the state, the people have not been slow to avail themselves of the new system. Through it they have already adopted among others a direct primary law,<sup>2</sup> a local option law,<sup>3</sup> a corrupt practices act,<sup>4</sup> constitutional amendments extending the system to municipal legislation, and allowing the referendum as to items and parts of acts,<sup>5</sup> and providing for proportional representation,<sup>6</sup> and laws imposing taxes upon the gross earnings of public service corporations,<sup>7</sup> and prohibiting free passes.<sup>8</sup> As this is but the partial fruitage<sup>9</sup> of only three general elections, it would seem that the system is destined to play a large part in the legislative history of the Sunset State.

### *Nevada*

As in Oregon so in Nevada, which was the next state to take action on the referendum, the constitution <sup>10</sup> requires the approval of two successive legislatures. The Nevada legislature of 1901 adopted a joint and concurrent resolution <sup>11</sup> embodying the principle of the referendum, but not providing for the initiative. At the session of 1903 this resolution does not appear to have been specifically approved, but another was adopted with almost the same phraseology as the Oregon amendment.<sup>12</sup> The one ratified by the people at the general

"The Education of Voters," *Political Science Quarterly*, XXII, 484. The entire act was superseded by the more elaborate provisions of Chap. 226 of Oregon Laws, 1907.

<sup>1</sup> *Kaddery v. Portland*, 44 Oreg. 118, 145. See a discussion of this case in *Arena*, XXXII, 128, and cf. *In re Pfahler*, 88 Pac. Rep. 270; 150 Cal. 71; *Hopkins v. Duluth*, 81 Minn. 189; *Ex parte Wagner*, 95 Pac. Rep. (Okla.) 435.

<sup>2</sup> Oregon Laws, 1905, Chap. I.

<sup>3</sup> *Id.* Chap. II.

<sup>4</sup> *Equity*, X, 87.

<sup>5</sup> N. Y. State Library Bulletin of Legislation, 110 (1906), 115 c.

<sup>6</sup> *Equity*, X, 87.

<sup>7</sup> Oregon Laws, 1907, Chaps. I, II.

<sup>10</sup> Nev. Const., Art. XVI, sec. 1.

<sup>8</sup> *Referendum News*, No. 9, p. 3.

<sup>11</sup> Nevada Laws, 20th Sess. (1901), 139.

<sup>9</sup> *Id.*

<sup>12</sup> *Id.* 21st Sess. (1903), 231.

election of 1904 appears,<sup>1</sup> however, to have been the proposal of 1901, and as such it is inserted in the official edition of the constitution as amended,<sup>2</sup> perhaps on the theory that the second resolution necessarily included and involved approval of the first. Inasmuch, however, as the constitution expressly requires<sup>3</sup> that "such proposed amendment . . . shall be agreed to" by the second legislature, it would seem to preclude the substitution of a new amendment, though embodying in substance the old. In the latest official edition<sup>4</sup> of the Nevada constitution the amendment in question is omitted. Nevertheless a referendum was taken of the act of Jan. 29, 1908, providing for an armed police force, which was adopted.<sup>5</sup>

### *Missouri*

In 1903 the legislature of Missouri adopted a joint and concurrent resolution,<sup>6</sup> proposing a constitutional amendment which provided, in much the same phraseology as the Oregon clause, for the initiative and referendum. It came before the electors of Missouri, but failed of adoption<sup>7</sup> — seemingly the first instance of such a failure where the system has been placed fairly before the people. The legislature of 1907, however, resubmitted the proposal<sup>8</sup>; in slightly differing phraseology,<sup>9</sup> and the electors again voted on the question at the general election of 1908, this time favorably by a margin of over 30,000.

### *Montana*

The Montana legislature submitted a proposed initiative and referendum amendment<sup>10</sup> in 1905. It appears to have been modelled upon the Oregon provision, and went to the people at the general election of 1906, when it was adopted.<sup>11</sup> Although quite specific in its provisions, it was supplemented, in 1907, by an elaborate piece of

<sup>1</sup> Nevada Laws, 22d Sess. (1905), 339, 340.

<sup>4</sup> Nevada Laws, 23d Sess. (1907), 486.

<sup>2</sup> Id.

<sup>5</sup> Equity, X, 43.

<sup>3</sup> Art. XVI, sec. 1.

<sup>6</sup> Missouri Laws, 1903, 280.

<sup>7</sup> Id. 1905, 312-325; New York State Library Legislative Bulletin, 1904, 115 b.

<sup>8</sup> Missouri Laws, 1907, 452.

<sup>9</sup> A petition of eight per cent is required for the exercise of the initiative and ten per cent for the referendum, while municipal legislation is not expressly included.

<sup>10</sup> Montana Laws, 1905, Chap. 61.

<sup>11</sup> New York State Library Index of Legislation, 1906, 115 b.

legislation<sup>1</sup> relating to procedure embodying *inter alia* the Oregon plan of instructing the voters by means of literature distributed by the Secretary of State, but furnished by those initiating or opposing a measure.

### *Delaware*

Although Delaware is distinguished as the one state in which the people have had no share in adopting or amending a constitution, and although even the statutory referendum has been almost unknown there,<sup>2</sup> its legislature in 1905 submitted<sup>3</sup> to the electors the question, "Shall the general assembly of the state of Delaware provide a system of advisory initiative and advisory referendum?"

The vote was taken in November, 1906, and of the votes cast on the proposition, a large majority was in the affirmative.<sup>4</sup> A year later the question of prohibiting the liquor traffic was voted upon throughout the state.

### *Maine*

At its session of 1907, the legislature of Maine submitted an elaborate proposal<sup>5</sup> for a constitutional amendment incorporating the new system. It includes the main features of the Oregon measure, but makes possible a gain in economy and speed by providing<sup>6</sup> that a measure proposed by twelve thousand electors and enacted by the legislature without change need not be further submitted. It also requires the submission of competing measures. As in Missouri this proposal was adopted by the electors at the general election in 1908.

### *Oklahoma*

The latest commonwealth to join the movement for the initiative and referendum, and the first to embody it in an original constitution,

<sup>1</sup> Montana Laws, 1907, Chap. 62.

<sup>2</sup> The one conspicuous instance — the attempted submission of a prohibitory liquor law in 1847 — was frustrated by the decision of the Supreme Court in *Rice v. Foster*, 4 Harr. (Del.) 479.

<sup>3</sup> Delaware Laws, 1904-1905, Chap. 53.

<sup>4</sup> New York State Library Index of Legislation, 1906, 115 a. In the legislature of 1907 such a measure passed the House but failed in the Senate through one senator's objection, which prevented the unanimous consent necessary to consider it.

<sup>5</sup> Maine Acts and Resolves, 1907, Chap. 121, p. 1476.

<sup>6</sup> *Id.* 1478.

is Oklahoma. This newest of states enters the Union with a fundamental code ratified by an unusual majority, which devotes an entire article<sup>1</sup> to the new system along the lines of the Oregon plan, but applicable as well to items and parts of acts<sup>2</sup> and to county and district legislation.<sup>3</sup> The article appears sufficiently specific to be self-executing,<sup>4</sup> but it provides for further legislation "to prevent corruption in making, procuring, and submitting initiative and referendum petitions."<sup>5</sup>

### *Other States*

A measure similar to that of Oregon has been approved by the North Dakota legislature, but requires the assent of a second legislature before going to the people.<sup>6</sup>

The Ohio Legislature of 1908 also passed an enactment embodying the system and providing for its extension to local government.<sup>7</sup>

Such, then, is the present status of the initiative and referendum in America as revived and reestablished upon Swiss models. Without assuming to forecast the future we may summarize the results as follows: —

1. Everywhere the system is merely an alternative one. No attempt has been made to abolish law-making by legislature; only to supplement it with law-making by popular vote, and that, too, not in all cases, matters requiring speedy action still being left to the representative body.

2. While the present movement started in the trans-Missouri region, and has had its greatest development there, it has also spread to other states, including the only one — Delaware — which has never employed the constitutional referendum; nor is it found exclusively in states dominated by either of the great political parties. The movement, in fact, is neither sectional nor partisan.

3. The system, as yet, has been in full working order in but one state, — Oregon, — and if it has brought evil results there, they have not been made known to the country at large.<sup>8</sup> No radical or other-

<sup>1</sup> Oklahoma Const., 1907, Art. V.    <sup>4</sup> But see *Ex parte Wagner*, 95 Pac. Rep. 435.

<sup>2</sup> Id. sec. 4.

<sup>5</sup> Id. sec. 8.

<sup>3</sup> Id. sec. 5.

<sup>6</sup> North Dakota Laws, 1907, p. 451.

<sup>7</sup> See *Equity*, X, 72. Submission of a referendum amendment was publicly commended by both United States senators from Ohio.

<sup>8</sup> See articles by W. S. U'Ren, *Arena*, XXXII, 128, and R. I. Platt, *Yale Law Journal*, XVIII, 40.

wise objectionable measures have yet been enacted by this method. The two most conspicuous laws — those providing for the direct primary and for taxing the gross earnings of corporations — have long been urged by conservative reformers elsewhere. Nor has there been any such lack of interest on the part of the electorate as would indicate that good measures are likely to fail or bad ones to be adopted through the indifference of the better class. At the last general election in Oregon the vote on pending measures was in one case seven-eighths of the total vote for officials.<sup>1</sup> Even in a state where it has received little practical use, though authorized, its value in abolishing the lobby has been attested by the chief executive.<sup>2</sup>

Finally the educational influence of the system, especially when coupled with special features like those already noticed in Oregon and Montana, should not be ignored. The movement on the whole is one of the most significant of contemporary political tendencies in America, and furnishes a subject for profitable study and thoughtful consideration.

<sup>1</sup> See *ante*, p. 345, n. 3; *Review of Reviews*, XXXIV, 143; *Political Science Quarterly*, XXII, 484, 494. The article last cited quotes a visitor in an Oregon village as saying: "There can be no question of the fact that the voters were much interested, and the more intelligent ones had a sense of responsibility which made them express themselves with a good deal of emphasis."

<sup>2</sup> See *Independent*, LIV, 1977.

## D

### POPULAR PARTICIPATION IN LAW-MAKING OUT- SIDE OF THE UNITED STATES

#### CHAPTER XXIX

##### FRANCE

It has already been shown <sup>1</sup> how the work of the Massachusetts convention of 1780, resulting in the first popular state constitution, influenced the political thought of contemporary France. The effect of this is apparent in the first great instrument put forth by the promoters of the French Revolution — the Declaration of the Rights of Man. That famous document recited: —

"Law is the expression of the general will. All citizens have the right to participate in its formation, either personally or through representatives.<sup>2</sup> . . . Sovereignty resides in the people; it is one and indivisible, imprescriptible and *inalienable*."<sup>3</sup>

"It is hard to say," observes Borgeaud,<sup>4</sup> . . . "what the Bishop of Autun, who proposed it, and the Assembly meant by the words, 'personal participation in the framing of laws.' The provision was never discussed. Some possibly regarded it as only a declaration of the eligibility of all to legislative functions. But others certainly — and they were in the majority — regarded the 'personal participation' as referring to the final adoption of the constitution."

##### A. *The Constitutions*

The next instrument, the constitution of 1791, was not, however, submitted to the people, nor was provision made therein for such a course in the future. In the assembly which framed it, Malouet

<sup>1</sup> *Ante*, 177.

<sup>2</sup> Art. 6.

<sup>3</sup> Art. 25.

<sup>4</sup> "Adoption and Amendment of Constitutions" (Hazen's Trans., New York, 1895), 199.



argued for its approval by "the real and undeniable majority of the nation,"<sup>1</sup> but as finally adopted it provided for a convention to consider amendments proposed by the three preceding legislatures.<sup>2</sup>

When, in 1792, the revolutionary movement passed into the hands of the National Convention, it was soon apparent that the principle of directly consulting the people had gained. One of the convention's first acts was to declare, without a dissenting voice, "that there can be no constitution which is not adopted by the people."<sup>3</sup> As it proceeded with its work it appointed a committee to formulate a plan for a constitution, and the two most active members of this committee were Condorcet, student and admirer of American institutions, and Thomas Paine. The plan reported by this committee provided for consulting the people in their primary assemblies with reference to the calling of a convention and for submitting its work to them. It also provided for the initiative by which, at the instance of fifty citizens, a primary assembly might consider and adopt a demand for revision, which, if approved by the assemblies of *arondissements* and departments, successively, would require a submission to the entire electorate.<sup>4</sup>

"The whole plan," says Borgeaud,<sup>5</sup> "was the result of a systematic union of the principles of New England and those of the eighteenth-century French philosophy. In it we find Puritan democracy, only it is formulated by a savant and secularized by an encyclopedist."

### *The Constitution of the Year I*

The fall of the Girondists effected a change in the exponents of constitutional reform, but not in its tendencies. The new committee, appointed at the instance of the Mountain, reported a plan which retained the essential features of Condorcet's. While the convention was to be nothing more than the ordinary legislative body, both the initiative and the appeal to the people were provided for in the following terms: —

"If in a majority of the departments, a tenth of the primary assemblies of each, regularly organized, demand a revision of the constitution or a change of any of its articles, the legislative body must summon all the primary assemblies of the

<sup>1</sup> *Moniteur*, August 31, 1791.

<sup>2</sup> Title VII.

<sup>3</sup> Borgeaud, "Adoption and Amendment of Constitutions," 205.

<sup>4</sup> *Moniteur*, XV, 437 *et seq.* (Reprint).

<sup>5</sup> 206.

republic to pronounce upon the question of the convocation of a national convention."<sup>1</sup>

Of greater interest than all, however, is the extent to which this instrument invites the participation of the people in ordinary legislation. Following are some of its provisions:<sup>2</sup>—

"Art. 7. The sovereign people is the totality of French citizens. . . .

10. It deliberates upon the laws.

19. Votes upon the laws are given by *yes* or *no*. . . .

#### *Of the Enactment of Law*

56. Projects of law are preceded by a report.

57. The discussion cannot begin and the law cannot be provisionally decreed until fifteen days after the report.

58. The project is printed and sent to all the communes of the Republic under this title: *Proposed law*.

59. Forty days after the sending of the proposed law, if in one-half of the departments plus one, a tenth of the regularly constituted primary assemblies of each of them do not object, the project is accepted and becomes *law*.

60. If there is objection, the Legislative Body convokes the primary assemblies."

We have seen<sup>3</sup> how, more than fifteen years previously, the constitution makers of Georgia adopted the initiative principle, but this appears to be the earliest instance of incorporating the referendum for ordinary laws into a modern written constitution. "The first appearance," says Bryce,<sup>4</sup> "of the method of direct legislation by the people, is, so far as I know, the provision of the French constitution<sup>5</sup> framed by the National Convention in 1793." There was no express requirement that the instrument itself should be submitted to the people, but this was doubtless because all were so strongly agreed on that course that no requirement was necessary. The constitution went to the people on August 9, 1793, and was ratified by them, and although it never came into force, it exerted a profound influence upon later French history.<sup>6</sup>

<sup>1</sup> Art. 115.

<sup>2</sup> The text here followed is that of Anderson's "Constitutions and Documents of France," 170.

<sup>3</sup> *Ante*, 155.

<sup>4</sup> "The American Commonwealth," I, 465.

<sup>5</sup> He excepts, of course, the survivals in Switzerland, "and the tiny republics of Andorra and San Marino."

<sup>6</sup> See Lecky, "Democracy and Liberty," I, 14, 15.

*The Constitution of the Year III*

The constitution of 1795, officially known as the "Constitution of the Year III," was a result of the popular uprising for the restoration of the short-lived instrument of 1793. In April, 1795, the convention appointed a constitutional commission consisting of eleven members<sup>1</sup> which made much of "the American model to which their colleagues often referred."<sup>2</sup> The proposals of the commission were presented in June, and in the course of the debate Baudin, one of the commissioners, declared —

"that the Constitution must receive its final ratification from the great mass of the French people, by a decree of the whole nation passed in their assemblies of primary electors."<sup>3</sup>

The instrument as finally adopted omitted the initiative and the preliminary consultations of the people, but it embodied the plan of submission as to future changes in these words: —

"The constitutional convention shall immediately submit its plan of revision to the primary assemblies. It shall be dissolved as soon as the plan has been thus submitted."<sup>4</sup>

The convention likewise declared that the new instrument "should be laid before the armies also for acceptance, — a formality the sole undisguised purpose of which was to intimidate the hostile *Bourgeoisie*."<sup>5</sup> At the same time the convention undertook to maintain itself in power by directing that two-thirds of its membership should be reelected. This last provision called forth violent opposition from the Paris sections, which was met by coercive measures on the part of the convention.

"In the Lepelletier Section the proceedings were inaugurated by a solemn declaration that every citizen was entitled to express his opinion freely on the Constitution, the decrees, and every measure for the public weal, because every other authority must give way before the primary assemblies of the sovereign people, and that, to this end, all citizens were placed under the common protection of their own and all other Sections. The Convention considered this resolution so dangerous, that some members demanded that it should sit *en permanence*; however they contented themselves for the present with issuing a sharp decree, which forbade under heavy penalties the establishment of a Civic central committee, such as the Sections desired. They decreed at the same time the removal of all officials who were non-juring priests, officers of the National Guard, or relatives

<sup>1</sup> Von Sybel, "History of the French Revolution" (London, 1869), IV, 304.

<sup>2</sup> Id. 320.

<sup>3</sup> Id. 407.

<sup>4</sup> Title XIII, Art. 346.

<sup>5</sup> Von Sybel, "History of the French Revolution," IV, 410.

of an *Émigré*; and above all they strengthened themselves by addresses of devotion from the regiments, which on a hint of the Committees were easily obtained."<sup>1</sup>

The results of the submission showed, however, that the French electorate understood its rights and was able to discriminate between the instrument which it really desired and the measures which the convention was attempting to force upon it:—

"One Section after another announced with ostentatious malice that their primary assembly had accepted the Constitution but rejected the decrees. They did not, however, succeed at this very first step in carrying the provinces with them, the return on the contrary showed a considerable majority for the electoral law also. The mass of the population, owing to the prevailing apathy, had taken no part in the voting at all. For the Constitution there were 900,000 votes and 40,000 against it; for the decrees nearly 170,000 and against them 93,000. The armies had unanimously voted addresses of approval. Whereupon on the 23d of September, the Convention declared the Constitution and the electoral decrees to be law."<sup>2</sup>

The figures given out by the convention itself showed a much larger majority for the decrees.<sup>3</sup> But their opponents denied the correctness of these returns, and time has confirmed their charges. It is now believed that the same voters who ratified the "Constitution of the year III" rejected the decrees.<sup>4</sup> The electors of revolutionary France had progressed far enough to be able to express their convictions, even if these could not be registered.

### B. The Napoleonic Plebiscites

With the advent of Napoleon as the dominant power in France, the direct participation of the people in the making and changing of the fundamental law was not, *pro forma*, abolished. But it was employed under forms and methods which rendered it of little value as a genuine expression of public opinion.<sup>5</sup> In the first place, the

<sup>1</sup> Von Sybel, 412-415.

<sup>2</sup> Id. 416.

<sup>3</sup> These were 205,498 in favor of the decrees as against 108,784 opposed.

<sup>4</sup> Borgeaud, "Adoption and Amendment," 216.

<sup>5</sup> "The Napoleonic Universal Suffrage which has destroyed freedom in France and has reduced Savoy and Nizza to the same level of bondage, is simply a palpable cheat, which, had its results been less grave, would have been the mere laughingstock of Europe. It is a mere device to entrap a whole people into giving an assent to proposals which would not be assented to by their lawful representatives. Hitherto it has been in every case a mere sham. There has been no free choice, no fair alternative

method of balloting was changed. Instead of voting in primary assemblies as before, the elector was now required to sign a public register at the cantonal capital, at the same time announcing his vote.<sup>1</sup>

The suggestion of this has been ascribed to the English poll-book system,<sup>2</sup> though it also strongly recalls the method of approving the British covenants of the seventeenth century. But in a country where a freer and more secret method had actually been employed, it marked a decided retrogression, and it was evidently understood that this was a device of absolutism to prevent a fair expression by the people. When this "Constitution of the year VIII" was "submitted to the acceptance of the French people," only about fifteen hundred votes were cast against it, while three million were recorded in its favor.<sup>3</sup> This disparity could hardly have resulted had the voting been free and untrammelled, and had not the electors realized perfectly well that a vote in opposition would be known and considered as an act of hostility toward the government.

In 1802 the Council of State, which included the chief supporters of the government, agreed upon the following "Act":<sup>4</sup>—

"The Consuls of the Republic, considering that the resolution of the First Consul is a striking homage paid to the sovereignty of the people; *that the people, consulted on its dearest interests ought to know no other limit than its interests themselves*, decree as follows, &c. The French people shall be consulted on these two questions,—

1. SHALL NAPOLEON BONAPARTE BE CONSUL FOR LIFE?

2. SHALL HE HAVE THE FACULTY OF APPOINTING HIS SUCCESSOR?

"Registers shall be opened for this purpose at all the *mairies*, at the offices of the clerks of all the tribunals, at the houses of the notaries, and those of all public officers."

between two or more proposals or between two or more candidates. The people have only been asked to say Yea or Nay to something which has been already established by military force." — Freeman, "History of Federal Government," 71.

<sup>1</sup> Borgeaud, "Adoption and Amendment of Constitutions," 217.

"It was decided that the Constitution (of the year VIII) should be submitted to the national opinion, by means of registers opened at the *mairies*, and at the offices of the justices of the peace, notaries, and clerks of tribunals, and that, till its acceptance, *of which no doubt appeared to be entertained*, the First Consul, the retiring Consuls, and the two Consuls elect, should proceed to make those appointments with which they were charged, so that, on the 1st of Nivôse, the great powers of the State might be constituted, and ready to put in practice the New Constitution." — Thiers, "History of the Consulate and the Empire of France," I, 61.

<sup>2</sup> Borgeaud, 217.

<sup>3</sup> Id.

<sup>4</sup> Thiers, II, 295.

The second question was afterward eliminated by Napoleon himself, and only the first was submitted. Thiers thus describes its reception, stating the case, we may be sure, most favorably to the government:<sup>1</sup> —

“To announce that such a question had been put to France was to announce that it was resolved upon. If public opinion, which had become passive, did not take the initiative of great resolutions, it might nevertheless be relied upon that it would cordially sanction whatever might be proposed to it in favour of the First Consul. It felt from [for] him confidence, admiration, gratitude, all the sentiments which a susceptible and enthusiastic people is capable of feeling for a great man, from whom it has received so many benefits at once. . . . They went most cheerfully to the *mairies*, to the notaries, to the offices of the clerks of the tribunals, to inscribe their approving votes in the registers opened to receive them.”

In the momentous change by which France passed from republic to empire, the people were not consulted. A vote of the tribunate, afterward ratified by the Senate, became, in 1804, the basis of a *Senatus Consultum*, by which the First Consul was asked to assume the title of emperor and the succession was made hereditary in the male line of his family.<sup>2</sup> But upon the occasion when he was proclaimed Emperor, and after it had been formally announced that “The Senate proclaims Napoleon Emperor of the French,” Bonaparte replied:<sup>3</sup> —

“I accept the title, which you believe to be useful to the glory of the nation.

I submit to the people the sanction of the law of hereditary succession. I hope that France will never repent of the honours with which she shall invest my family.

At all events, my spirit will no longer be with my posterity on that day when it shall cease to merit the love and confidence of the Grand Nation.”

It will thus be seen that the people had nothing directly to do either with the creation of the empire or the investiture of Napoleon with the title of emperor. All this was done before they were appealed to. But when the empire had become an established fact, there was submitted the incidental question as to the succession. Of this formality Thiers observes: —

“Although with sentiments somewhat different from those which filled their breasts in 1799 and in 1802, the citizens eagerly flocked to all the places at which

<sup>1</sup> Thiers, 296, 297. Borgeaud says, “Three and a half million votes were cast in favour of ratification.” — “Adoption and Amendment,” 218.

<sup>2</sup> Thiers, III, 201 *et seq.*

<sup>3</sup> *Id.* 220.

registers were opened to record their votes. The affirmative suffrages were counted by millions,<sup>1</sup> and scarcely were the few negative suffrages, placed there in proof of the liberty enjoyed, perceptible amidst the immense multitude of favourable votes."<sup>2</sup>

But with the machinery of the empire already in working order, this can hardly be regarded as a real test of the popular will. Under the circumstances, as Borgeaud well remarks, "a vote against the hereditary transfer of the imperial dignity would have been a vote for civil war."

The last plebiscite of the First Napoleon was the submission of the "*Acte Additionnel*," or supplementary constitution, which the Emperor caused to be drawn by M. Constant, in the period between his two abdications and just before his final overthrow. In its preamble he declared:<sup>3</sup>—

"The constitutions of the Empire have thus been wrought out by a series of acts which have received the sanction of popular approval. . . . The following articles, supplementing the constitutions of the Empire, shall be submitted to all the citizens of France for their free and solemn approval."

The instrument thus brought forth was noted for its advanced provisions. "Never before," says Thiers,<sup>4</sup> "had so much liberty been accorded to France." But it came too late to call forth a general expression of popular approval. Whether those who participated were free to express their choice is disputed;<sup>5</sup> but that they were a small minority of the electorate appears to be certain.<sup>6</sup>

<sup>1</sup> 3,500,000 according to Borgeaud, 219.

<sup>2</sup> "History of the Consulate and the Empire, III, 224.

<sup>3</sup> Borgeaud, "Adoption and Amendment of Constitutions," 220.

<sup>4</sup> "History of the Consulate and the Empire," XI, 388.

<sup>5</sup> "There had been perfect freedom in voting for the Additional Act, and at the elections. There had been no restraint either in writing or speaking, nor were the votes of those who gave the most offensive reasons for their political opinions rejected." — Id. 445.

On the other hand, Borgeaud says:—

"It still appears very probable that, whoever was connected with the administration, either closely or remotely, was compelled to sign his name, or permit it to be signed, in the registers, which were open from the end of April till the month of June." — "Adoption and Amendment of Constitutions," 222.

<sup>6</sup> "The nation took no part in the voting for or against the Additional Act at the municipalities, notariats, or *justices de paix*, nor in the choice of representatives at the electoral colleges. Disgusted with revolutions and counter-revolutions, the people knew not whom or what to approve, and in their indecision remained concealed at home. . . . Formerly, when France looked on General Bonaparte as a saviour, three or four millions hastened to record their votes; but now not more than twelve or thir-

"The truth was," declares Borgeaud,<sup>1</sup> "that France had not voted."

### *Plebiscites of Napoleon III*

There seems to have been no actual instance of a plebiscite under either the restored Bourbons or Louis Philippe.<sup>2</sup> Proposed constitutions were prepared after each abdication of Bonaparte, in which a consultation of the people was a part of the plan.<sup>3</sup> But it was not until the advent of the lesser Napoleon that the *plebiscitum* was again employed. And with him the form of the submission was such as to leave less freedom of choice than was allowed even under the first Napoleon.

Instead of submitting a proposal in the interrogative form, so that the voter might feel that he was at liberty to return either a negative or an affirmative answer, the wording was such that the elector could have no doubt that the government expected and desired him to vote in the affirmative. Thus, in 1851, a proposal was submitted in this form:—

"The French people desires the maintenance of the authority of Louis Napoleon Bonaparte, and invests him with the powers necessary to establish a constitution, upon the basis outlined in his proclamation of December 2." <sup>4</sup>

This coercive declaration received the formal assent of nearly seven and one-half millions of electors, with a contrary vote of less than a tenth of that number. But the opposition had more substantial discouragement than the phraseology of the proposal. Most of their leaders were in prison, more than twenty departments were in a state of siege, and the press was notoriously fettered.<sup>5</sup> The will of the people could hardly be expressed under such conditions.

Louis Napoleon's constitution of 1852 was not submitted to the people. It provided, however, that he "always has the right (*sic*) to appeal" to them,<sup>6</sup> and also that "every modification of the *fundamental* provisions of the constitution . . . shall be submitted

teen thousand had voted on the Additional Act." — Thiers, "History of the Consulate and the Empire," XI, 445, 446.

<sup>1</sup> "Adoption and Amendment of Constitutions," 222.

<sup>2</sup> "A great displacement of political power was effected by the French Revolution of 1830." — Lecky, "Democracy and Liberty," I, 15.

<sup>3</sup> Borgeaud, "Adoption and Amendment," 224.

<sup>4</sup> Id. 239. Cf. Lecky, I, 38.

<sup>5</sup> Hélié, "Les Constitutions de la France," 1167.

<sup>6</sup> Art. 5.



to a popular vote based on universal suffrage."<sup>1</sup> This latter clause was applied within a year. The "modification" submitted, of course in the affirmative form, was as follows:—

"The French people desires the reestablishment of the imperial dignity in the person of Louis Napoleon Bonaparte with hereditary succession in the line of his direct legitimate, or adopted descendants. And it bestows upon him the right to regulate the order of succession to the throne in the Bonaparte family, as provided for in the *senatus-consult* of November 7, 1852."<sup>2</sup>

This time the affirmative vote was somewhat larger than in the preceding year.<sup>3</sup> The empire had become more firmly established and the electors correspondingly less disposed to thwart its plans.

Toward the close of the second empire a series of amendments was adopted by Parliament which liberalized considerably the constitution of 1852. In 1870 the popular approval of these measures was invited in the following phraseology:—

"The French people approves the liberal constitutional reforms, made since 1860 by the Emperor with the concurrence of the great political bodies of the State, and ratifies the *senatus-consult* of April 20, 1870."<sup>4</sup>

The vote on this proposition seems to have been fuller and freer than at any time since the Revolution. Election officers were instructed by the government both to "urge the people to the polls" and to assure them of absolute freedom in the expression of their will.<sup>5</sup>

The issue was squarely drawn "between the autocratic constitution of 1852 and the liberal constitution of 1870,"<sup>6</sup> and nearly nine million electors participated, almost five-sixths of them voting in favor of the reformed instrument.<sup>7</sup>

But this was the last French *plebiscitum*. The Napoleonic device of consulting the people in form, but not in reality, had borne fruit. The whole system of popular ratification was identified in the public mind with the dynasty, which finally collapsed at Sedan, and for more than an entire generation France has not consulted her people directly upon a constitutional question. This, however, can hardly be a permanent condition. Democratic sentiment seems to be stronger in

<sup>1</sup> Art. 32.

<sup>2</sup> Borgeaud, "Adoption and Amendment," 242.

<sup>3</sup> 7,800,000. Id. 242.

<sup>4</sup> Id. 244.

<sup>5</sup> Id.

<sup>6</sup> Journal Officiel, April 10, 1870. <sup>7</sup> 7,350,142 to 1,538,825. See Borgeaud, 244.

France to-day than at any time since the Revolution. The basic ideas of that great movement are regaining their hold upon the French people,<sup>1</sup> after a submergence of nearly a century under the wave of absolutism. As the nation comes to be more in touch with that fruitful period in which its modern national life takes root, it will find that popular ratification was not a Bonapartist idea, but an essential feature of the principles of the Revolution. The growth of the French Socialist party, with whom the referendum is a fundamental plank, will also influence the future, and we may look for France, which was the first to borrow the American system of submitting constitutions, eventually to revive the plebiscite.

<sup>1</sup> Witness the proposal in the Chamber to submit to a popular vote the question of separating church and state. *Review of Reviews*, XXX, 412.

## CHAPTER XXX

### ITALY

WE have seen <sup>1</sup> how the popular assembly reappeared for a time in the mediæval Italian communes. The Swiss republic also, with its ancient folkmoets preserved from antiquity was, doubtless, not without influence upon its southern neighbor; and in this connection the fact that the modern plebiscite began, as we shall see, in the states of northern Italy, is significant. But the immediate source of that institution, or perhaps the occasion of its revival, is probably to be found in France. French influence was dominant in Italy during the period when the plebiscite was most common in France, and it was then that modern Italy saw the first appeal to the people.

In 1848, just after Carlo Alberto had granted his celebrated *Statuto* to Piedmont and Sardinia, the project of union with the Piedmontese kingdom begun to be agitated in the other north Italian states. In Lombardy the provisional government submitted the question to the electors at the end of May, and while the experiment was not free from those coercive measures which had brought it into such discredit in France,<sup>2</sup> nevertheless, as King <sup>3</sup> observes:—

“The result must have surprised all parties. Five hundred and sixty thousand, or 84 per cent of the electorate, gave their votes, and barely seven hundred were recorded for postponing the question. Making every allowance for the unworthy arts of one party and the disorganization of the other, it showed an overwhelming preponderance in favor of fusion.”

<sup>1</sup> *Ante*, Chap. II; cf. Bryce, “American Commonwealth,” I, 448, on the survival in San Marino.

<sup>2</sup> “Royalist agents had been at work, and the idea was abroad, that if the vote went against Charles Albert, he would withdraw from the war. Gioberti was brought to Milan to act as a counterpoise to Mazzini, and his theme of ‘Charles Albert or Austria’ was sung in every key. The republicans, divided and irresolute, many of their leaders away at the war, ill-at-ease in opposing a movement that told for unity, for the most part abstained. Villagers voted under the eyes of the priest, soldiers at their officers’ bidding; forgery, pressure, coercion, were freely used.” — King, “History of Italian Unity,” I, 244.

<sup>3</sup> *Id.*

The question was also submitted in the adjoining duchies of Parma and Modena,<sup>1</sup> and in the following month in three of the Venetian provinces,<sup>2</sup> the vote in each showing large majorities in favor of union.

The immediate results of these plebiscites of 1848 were short-lived, and the union which they decreed fell with the reverses attending the Piedmontese arms. But the idea of consulting the people, like the patriotic movement of which it was a part, was not dead; it was merely awaiting a favorable opportunity for another manifestation, and this came with the impetus to Italian unity resulting from the truce between the French and Austrian emperors at Villafranca. In 1859 the proposal of annexation to Piedmont was again submitted in Parma, with a result even more pronounced in its favor than on the previous occasion.<sup>3</sup> During the next year, in the states of central Italy, the electorate, which included practically all adult males, was invited to choose between annexation or a separate kingdom, and about three-fourths of the registered voters participated. The plan of annexation was ratified in *Æmilia* by a practically unanimous vote,<sup>4</sup> and in Tuscany by an overwhelming majority.<sup>5</sup> Later plebiscites in *Marches* <sup>6</sup> and *Umbria* <sup>7</sup> brought forth a vote for annexation even more pronounced than in Tuscany.

The electors of Naples <sup>8</sup> and Sicily <sup>9</sup> declared for annexation in October, 1860. The alternative proposal of a separate kingdom was not submitted, and the formula, which recalled the phraseology of the Napoleonic plebiscites, was —

"The people desire Italy to be one and indivisible, with the constitutional royalty of Victor Emmanuel and his legitimate descendants." <sup>10</sup>

But the result was so pronounced as to show that annexation was clearly the wish of a majority.

"A total," says King,<sup>11</sup> "of nearly two million votes, with a handful of twelve

<sup>1</sup> "History of Italian Unity," I, 244.

<sup>2</sup> *Id.* 246. The plebiscite was refused in the city of Venice. *Id.* 247.

<sup>3</sup> The vote was "56,000 for annexation and less than 500 against it." — *Id.* II, 97, note.

<sup>4</sup> *Id.* II, 121.

<sup>6</sup> 133,000 to 1200. *Id.* 175.

<sup>5</sup> 386,000 to 15,000. *Id.*

<sup>7</sup> 97,000 to 380. *Id.*

<sup>8</sup> 1,310,000 for annexation and 10,000 against. In the city of Naples only 31 out of 106,000 voted against annexation. *Id.*

<sup>9</sup> 432,000 to 600. *Id.*

<sup>10</sup> Borgeaud, "Adoption and Amendment of Constitutions," 86.

<sup>11</sup> "History of Italian Unity," I, 175. Lord John Russell, however, though a

thousand against them, proved in the face of all cavillings how universal, at all events for the moment, was the desire for Unity in South and Central Italy."

In the same year (1860), plebiscites were taken in the Piedmontese provinces of Nice and Savoy on the question of annexation to France. Though nominally submitted by the authorities of Piedmont, these measures were really forced by the French Emperor, who had secured in advance a treaty of cession.<sup>1</sup> It was no doubt the knowledge that the result had thus been prearranged which disarmed the opposition and made possible an apparent unanimity at the polls in favor of annexation. For —

"it was notorious that the figures were no index to the wishes of the inhabitants. The government had, without any semblance of decency, exerted all its influence to secure the vote that it wished for. The majority of the Savoyards indeed were probably more than half disposed to separation, or cared little which way their fate went, though the northern portion of the province would have preferred to be joined to Switzerland. At Nice the feeling was strong against separation, and the people made pathetic efforts to escape the destiny imposed on them."

The "government" here referred to as employing these coercive measures was the Piedmontese government, but behind it was Napoleon III, who had extorted the cession by threats of armed force, and in order to complete it, had compelled the little Italian kingdom to make this plebiscite as farcical as that which had given formal sanction to the *coup d'état*.

There remained only the papal states where the *plebiscitum* had not been tried. Its employment there followed the entry of the Italian troops into Rome in 1870. Lanza, the commander of the king's forces, and temporarily at the head of the military government of the city, arranged for a plebiscite on the subject of union with the rest of Italy, preserving at the same time the spiritual authority of the Roman pontiff.<sup>2</sup> In October the vote was taken, and although it is said that many faithful Catholics absented themselves from the

friend of Italian unity, regarded the four plebiscites last noticed as having "little validity. These votes," he declared, "are nothing more than a formality following upon acts of popular insurrection, or successful invasion, or upon treaties, and do not in themselves imply any independent exercise of the will of the nation in whose name they are given." — "Speeches and Despatches," quoted by Lecky, "Democracy and Liberty," I, 494, 495.

<sup>1</sup> King, "History of Italian Unity" (New York, 1899), II, 120.

<sup>2</sup> Id. 122.

<sup>3</sup> Id. 377.

polls, nevertheless about four-fifths of the registered voters participated,<sup>1</sup> and the majority in favor of annexation was practically as pronounced as had been given by the other states ten and twenty years before.

Thus was the union of modern Italy achieved through the medium of the plebiscite. It must be remembered also that in voting for annexation these Italian states were likewise adopting new constitutions. For it was by virtue of these plebiscites that the *Statuto* of the petty Piedmontese kingdom has become the constitution of the Italian peninsula. The *Statuto*, as Borgeaud<sup>2</sup> observes —

“is a compact *sui generis*, in the establishment of which a king and several peoples have acted successively as sovereigns.”

In recent years there has appeared in Italy a tendency to apply the plebiscite in ordinary legislation<sup>3</sup> and it is interesting to note that the first actual experiments have been, like the original plebiscites, in northern Italy. In 1903 laws were passed providing for municipal control of public utilities, and in Milan a system of laborers' tenements under municipal control was adopted in 1906 by popular vote at a special election by a majority of eight to one.<sup>4</sup> An even more striking instance in the same region is thus described by United States Consul J. J. Roche, stationed at Genoa:—

“On April 29, [1906] the little commune of Canneto Pavese near Pavia in Lombardy, voted almost unanimously by referendum on the question of putting their business of wine making under a common management. Not only was this the first experiment in that function but it was also an experiment not at all contemplated by the framers of the laws.”<sup>5</sup>

The Italian constitution has never yet formally been changed. It has been developed by construction and legislation, but no formal amendments have been adopted.<sup>6</sup> When, as, in the course of their

<sup>1</sup> The registered vote was about 167,000; those actually voting were 133,000 in favor and 1500 against. King, 378.

<sup>2</sup> “Adoption and Amendment of Constitutions,” 84.

<sup>3</sup> See *Annals American Academy of Political and Social Science*, VI, 227 *et seq.*

<sup>4</sup> Consular and Trade Reports (May, 1906), No. 308, pp. 196, 197.

<sup>5</sup> Id. (June, 1906), No. 309, p. 118.

<sup>6</sup> Borgeaud, “Adoption and Amendment of Constitutions,” 84, 85.

The *Statuto* does not provide for its own amendment, but the opinion seems to prevail that this is permissible, not alone through Parliamentary action, but likewise by usage and interpretation. — Ruiz, “The Amendments to the Italian Constitution,” *Annals American Academy of Political and Social Science*, VI, 227.

national development, must happen, the Italians are called upon to revise or make additions to their *Statuto*, they may well revert to the plan so successfully followed in the formative period of their history, and invite the participation of the people. Nothing has ever so effectually brought to the surface the best in Italian civilization as the movement which manifested itself through those plebiscites of the nineteenth century; and in a revival of these Italy may find not alone the key to her future constitutional development, but likewise a remedy for that "unreality of her political life"<sup>1</sup> which is the regret of her sincerest friends and well-wishers.

<sup>1</sup> King, "History of Italian Unity," II, 382.

## CHAPTER XXXI

### OTHER EUROPEAN COUNTRIES

OUTSIDE of Switzerland, the most frequent use of the plebiscite in recent years has been in Scandinavian countries. The vote of the inhabitants of the Swedish Isle of St. Barthélemy, on the question of annexation to France, in 1878, was the most recent one taken on such a question.<sup>1</sup> The events by which the kingdom of Norway acquired its new political status were also marked by an employment of the referendum principle. While the Storthing, on June 7, 1905, declared a dissolution of the union with Sweden, the provisional government, forthwith established, proposed a submission of the question to the people. This was accepted by the Storthing, and August 13 was fixed as the voting day. The time was not favorable for a large vote; but the result, as predicted by an interested spectator,<sup>2</sup> showed the practical unanimity of the Norwegian people for separation. Only 184 votes against it were cast, and there were 368,200 in its favor.<sup>3</sup> When it came to determining the form of the new government, the Storthing showed less of a disposition to consult the people, and a motion to that end was rejected,<sup>4</sup> although, in the opinion of leading Norwegians,<sup>5</sup> popular sentiment was in favor of a republic. The proposal to invite Prince Charles of Denmark to become king of Norway was, however, submitted to the people on November 13, 1905, and received 259,936 affirmative votes as against 67,554 in the negative.<sup>6</sup> The failure to submit to the Norwegian people fairly and explicitly the question whether they desired a republic was a disappointment to lovers of republican institutions, and has been

<sup>1</sup> Lecky, "Democracy and Liberty," I, 478, 479; Card, "Les Annexions et les Plebiscites dans l'Histoire Contemporaine."

<sup>2</sup> Calvin Thomas, "The Plebiscite of the Norseman," *The Nation*, LXXXI, 161.

<sup>3</sup> *Political Science Quarterly*, XX, 772.

<sup>4</sup> Id.

<sup>5</sup> Bjørnsen and Løvland. See *Literary Digest*, XXXII, 98.

<sup>6</sup> *Political Science Quarterly*, XXI, 377.



ascribed to foreign monarchical influences.<sup>1</sup> But a people of so high a grade of intelligence, among whom illiteracy is almost unknown, which has once tasted of direct participation in the affairs of government, is not likely to be satisfied with its total disuse.

In Denmark a plan seems likely of adoption by which questions of municipal expenditures are to be submitted to the taxpayers.<sup>2</sup>

Iceland is another Scandinavian country in which the early custom of popular legislation seems recently to have been revived. The Alting, which was anciently, in form at least, a folkmoot, was dissolved at the beginning of the nineteenth century.<sup>3</sup> It was reëstablished in 1843 "as a sort of advisory council,"<sup>4</sup> and given full legislative powers in 1874. About thirty years later the island was granted greater autonomy by abolishing the office of governor general and providing a resident minister,<sup>5</sup> and this measure was "properly voted on and ratified not only by the Alting . . . but by the people itself."<sup>6</sup> These progressive acts of restoration have borne fruit in the further employment of the referendum, and the Alting submitted to the people in 1908 the question of prohibiting the importation of intoxicating liquors.<sup>7</sup>

The German government seems to have ignored its treaty obligation to give the Schleswig Danes a plebiscite on the question of reunion with Denmark;<sup>8</sup> but in the German free city of Bremen, according to the press reports, the people were asked to vote, in 1906, on a proposal to expend a considerable sum of public money for harbor improvements. The experience of Switzerland, which has already been briefly<sup>9</sup> noticed in connection with the origin of modern popular legislation, could not be treated adequately in less than a volume, and no review of it will be attempted here. But it is apparent that since the beginning of the French Revolution something

<sup>1</sup> See Gohier, "La Republique Escamoniée en Norwege," reviewed in *Literary Digest*, XXXII, 98. The author says: "If the decision had been preceded by a loyal discussion before the country and by an active propaganda in favor of the republican idea, the discussion would necessarily have concluded with the choice of a republic."

<sup>2</sup> *Equity*, IX, No. 4, p. 11.

<sup>3</sup> Bryce, "Studies in History and Jurisprudence," 272-274.

<sup>4</sup> *Id.* 272, note.

<sup>5</sup> "International Encyclopædia," IX, 774, 775; *Nation*, LXXXIII, 274, 275.

<sup>6</sup> *Review of Reviews*, XXXVI, 629.

<sup>7</sup> *Referendum News*, I, No. 10, p. 2.

<sup>8</sup> *Revue de Droit International*, II, 325, 326; Lecky, "Democracy and Liberty," I, 478.

<sup>9</sup> *Ante*, Chap. IV.

in the nature of popular law-making has been tried in considerable and widely separated portions of Europe. It is interesting to observe that it has been applied to the same subjects—changing the form of government, regulating the liquor traffic, and public expenditures—which engaged the attention of the American electorate in its irregular but steadily increasing use of the referendum in ordinary legislation during the nineteenth century.

## CHAPTER XXXII

### LATIN AMERICA

SOME approach to the idea of popular ratification seems to have found lodgment in a few of the Latin-American states. "Direct appeal to the voters through their primary assemblies," observes Borgeaud,<sup>1</sup> "has occurred here and there and at certain times, notably in Nicaragua, San Salvador, and Honduras." Speaking of the early constitutional history of another Central American state, a local writer says:—

"The Compact, or Constitutive Law of Costa Rica, was subscribed to December 1, 1821, by deputies from all the peoples, and sworn to; the 11th day of that month it was sent forth to the towns. . . . On the 18th there was received in Cartago the invitation of Iturbide to join Mexico; *the towns decided in favor of it* and nearly all took the oath of independence."<sup>2</sup>

In 1826 Bolivar seems to have observed the semblance of submission to a popular vote in Peru. The constitution which he had just previously framed for Bolivia provided for an elector to be named by every ten citizens,<sup>3</sup> and when the Peruvian Congress invited "*El Libertador*" to consult the provinces as to the form of a constitution, he seems to have employed this system of electors and to have sent out for their ratification his Bolivian instrument adapted in phraseology to Peru.<sup>4</sup> But this submission, limited though it was, appears to have been more formal than real. While fifty-eight of the electoral colleges approved, and but one rejected,<sup>5</sup> the *Código Boliviano*,

<sup>1</sup> "Adoption and Amendment of Constitutions," 196. Elsewhere (194) the same author speaks of certain South American states "applying the principle of an appeal to the people at some stage of the constituent work." But it is evident that by this "appeal" he means no more than a new election of members of a Congress to pass on the proposal.

<sup>2</sup> Calvo, "The Republic of Costa Rica" (Chicago, 1890), 249, 250.

<sup>3</sup> Cushing, "Bolivar and Bolivian Constitution," *North American Review*, XXX, 44.

<sup>4</sup> Id. 47.

<sup>5</sup> "Such perfect unanimity could never result from the self-moving deliberations of a free people, disposing of their own rights according to their own will."—Id. 49.

the result was not attained without coercion and even the employment of troops, at least for effect.<sup>1</sup> The so-called "South American Washington" seems to have inclined to the ideals of Bonaparte, rather than to those of the northern patriot,<sup>2</sup> and his ostentatious "appeal to the people" resembled the then recent French plebiscites far more than the methods of popular constitution-making which were slowly developing in North America. Hence, this instance of 1826 had no results in establishing popular ratification in Peru, whose present constitution, like those of most other Latin-American states, provides for changes by the legislature alone.<sup>3</sup>

The truth is, these so-called republics, while geographically near the United States, are politically related more closely to Europe. Thus the Mexican constitution of 1824 was modelled, not, as is

<sup>1</sup> *North American Review*, XXX, 47.

<sup>2</sup> "It was not for the memorials from Arlington-House, transmitted to him with such kindly and respectful feelings, that he preserved his veneration; but portraits and busts of Napoleon were the chosen ornaments in his palace of La Magdalena." — *Id.* 48.

<sup>3</sup> *Argentina*. — "The Constitution can be amended, either wholly or in part. The necessity for such amendment shall be declared by Congress, with the concurrence of at least two thirds of the members; but the amendment itself shall not be made except by a convention called for that purpose." — Argentine Constitution (1860), Chap. XXX; New York Convention Manual, 1894, Vol. 3, Foreign Const., 11.

*Brasil*. — "The constitution may be amended by the initiative of the National Congress or of the State assemblies."

\* \* \* \* \*  
"This proposition shall be considered approved if it is done during the following year, and after three discussions, by a majority of two-thirds of the votes in the two chambers of Congress." — Constitution of Brazil, Art. 90; New York Convention Manual, 136.

*Colombia*. — "This constitution may be amended by a legislative act, discussed first and adopted after the several readings in the usual manner by Congress, submitted by the Government to the next following Legislature for its definite action, and by it newly discussed and finally adopted by two-thirds of the members of both houses." — Constitution of the Republic of Colombia, Art. 209; New York Convention Manual, 186.

The Colombian constitution of 1821 provided for amendments to be proposed by two-thirds of each house, to be considered after one-half the members had been displaced, when adoption could be effected by two-thirds; certain parts were unalterable, but a convention was provided for after ten years to revise and amend. *Niles Weekly Register*, XXII, 230, 247; *North American Review*, XXIII, 314.

*Ecuador*. — "Whenever the Chambers, by absolute majority, may deem it advisable to reform the Constitution, a proposition to that effect shall be introduced in Congress, in order that it be considered when the renovation spoken of in Articles 57 and 58 has taken place; and, if at that time the Chambers, by an absolute majority, acting in conformity with the provisions of Section 69, Title VI, approve it, the amend-

popularly supposed, upon the American, but upon the Spanish constitution of Cadiz, promulgated in 1812.<sup>1</sup>

Moreover, the conditions in those countries have always been unfavorable to a genuine appeal to the people. The lack of schooling and experience in self-government and popular legislation might be overcome, as it partly has been in France and Italy. But military dictatorships and chronic revolutions are incompatible with the enjoyment of popular constitution-making, and until these are outgrown, Latin America can hardly hope to realize that system.

"In a state standing on the eve or morrow of a revolution," says Borgeaud,<sup>2</sup> "appeal to the people, although theoretically justifiable by the principles on which the government is based, is rendered impossible by circumstances."

ment shall be then made part of the Constitution." — Title XII, Constitution of the Republic of Ecuador; New York Convention Manual, 217.

*Honduras.* — "The present constitution may be amended. The necessity for amendment may be declared by the ordinary congress, but the amendment can be effected only by a national constitutional convention for the purpose. No proposition of amendment shall be efficacious unless approved by a two thirds majority of congress. The case provided for in Art. I is exempt from these requirements." — Constitution of Republic of Honduras, Art. XXVII; New York Convention Manual, 296.

*Mexico.* — "The present constitution may be added to or reformed. In order that additions or alterations may become part of the constitution, it is required that the congress of the Union, by a vote of two-thirds of the members present, shall agree to the alterations or additions, and that these shall be approved by the majority of the legislatures of the states. The congress of the union shall count the votes of the legislatures and make the declaration that the reforms or additions have been approved." — Constitution of the United States of Mexico, Title VII; New York Convention Manual, 356.

*Peru.* — "Reform of one or more constitutional articles may be sanctioned in ordinary Congress, subject to the same forms as any project of law must pass through; but it cannot take effect unless it is ratified in the same way by the succeeding ordinary legislature." — Peruvian Constitution (1860), Title XVIII, Art. 131. See Markham, "History of Peru" (Chicago, 1892), 515 *et seq.*

*Venezuela.* — "This constitution can be reformed by the national legislature if the legislatures of the states desire, but there shall never be any reform except in the parts upon which the majority of the states coincide; also a reform can be made upon one or more points when two thirds of the members of the National Legislature, deliberating separately and by the proceedings established to sanction the laws, shall accord it, but in this second case, the amendment voted shall be submitted to the legislatures of the states, and it will stand sanctioned in the point or points that may have been ratified by them." — Constitution of Republic of Venezuela, Art. 118; New York Convention Manual, 439.

<sup>1</sup> *Texas Historical Association Quarterly*, January, 1900, 161 *et seq.*

<sup>2</sup> "Adoption and Amendment of Constitutions," 197.

## CHAPTER XXXIII

### AUSTRALIA

THE early Australian "constitutions" were mere acts of the British Parliament, providing for systems of government in the various colonies. Commencing with 1823, when the constitutional statute for New South Wales was passed, there was a series of such enactments,<sup>1</sup> which, in origin, more resembled the colonial charters of early America than constitutions of the states. There was no action on the part of the people even in making alterations,<sup>2</sup> and while by 1853 the colonial legislatures began to frame instruments for themselves,<sup>3</sup> these were all subject to approval and alteration by the home government, and in at least one instance the proclamation of the statute, as enacted by the British Parliament, called forth a local legislative protest.<sup>4</sup>

#### *A. The Federation Movement*

It was not until the last decade of the nineteenth century that the plan seems to have been presented of consulting the people with regard to constitutional changes, and it then became a part of the movement for Australian federation. That idea was suggested from England as early as 1847,<sup>5</sup> but it found little favor in Australia until a considerably later period, and for a long time the movement went no farther than conferences and discussions. In 1891, at Sydney, a convention assembled whose delegates were empowered by their respective colonies "to consider and report upon an adequate scheme for a

<sup>1</sup> Jenks, "History of the Australasian Colonies" (Cambridge, 1896), 54 *et seq.*; Jenks, "Government of Victoria" (Cambridge, 1891), 69 *et seq.*

<sup>2</sup> See Rusden, "History of Australia" (London, 1883), Vol. III, Chap. XVI.

<sup>3</sup> See Quick and Garran, "Annotated Constitution of the Australian Commonwealth" (London, 1901), 44, 55, 61, 64.

<sup>4</sup> Jenks, "Government of Victoria," Chap. XVI.

<sup>5</sup> By Earl Grey, Secretary of State for the Colonies. Quick and Garran, "Annotated Constitution of the Australian Commonwealth," 81 *et seq.*

Federal Constitution.”<sup>1</sup> The instrument framed by this body contained no recognition of the principle of popular ratification. It provided for amendment through proposals by the federal Parliament, to be ratified by popularly chosen state conventions — a feature apparently borrowed from America. But when this plan was reported to the convention, it furnished an opportunity for what seems to have been the first formal suggestion of submission to the electors of Australia. Mr. Playford, the Premier of South Australia, objected that the proposed plan “was a clumsy contrivance, and that the whole difficulty arose from the false principle of taking the voice of the people indirectly through conventions, instead of directly at the polls. He advocated the Swiss plan of a referendum, requiring the assent of a majority of the people, and separate majorities in more than half the states.”<sup>2</sup> An amendment embodying these views was advocated by other prominent members of the convention, but was rejected. Another occasion was offered, however, in determining the mode of referring the instrument itself to the colonies. Sir George Grey of New Zealand moved that it be “submitted to and adopted by a majority of a plebiscite of the people of Australia.”<sup>3</sup> But he afterward accepted an amendment substituting a separate submission for each colony. The feeling prevailed, however, that the convention should not assume to dictate the method of acceptance, and it was finally decided merely to recommend that “provision be made by the parliaments of the several colonies for submitting for the approval of the people of the colonies respectively the constitution of the commonwealth of Australia, as passed by this convention.”<sup>4</sup>

The reception accorded the new instrument by the colonies was not enthusiastic, but there were signs that the sentiment for popular ratification was growing. In the New South Wales Assembly, Sir Henry Parkes gave notice of a resolution, which however was not reached before adjournment, approving the conventions’ work, but declaring “that the question as dealt with by this parliament should be submitted to the people in their electoral capacity for final approval.”<sup>5</sup> In the South Australian Assembly a motion was offered providing that amendments to the new constitution should be submitted directly to the people, instead of to conventions.<sup>6</sup>

<sup>1</sup> Quick and Garran, “Annotated Constitution of the Australasian Colonies,” 123 *et seq.*      <sup>2</sup> *Id.* 141.      <sup>3</sup> *Id.* 142.      <sup>4</sup> *Id.*

<sup>5</sup> *Id.* 145.

<sup>6</sup> *Id.* 147.

*B. Popular Interest Awakened*

The Commonwealth Bill of 1891 was never adopted by any colony, and for a while the whole movement was apparently doomed to failure. But in the early nineties the cause was espoused by a society known as the Australian Natives' Association, and from this time on it became a movement from the people, instead of an idea of statesmen and doctrinaires. At a conference of the "Natives" and kindred associations at Corowa, in the summer of 1893, where much enthusiasm for federation was manifested, a resolution offered by Dr. John Quick<sup>1</sup> was unanimously adopted, providing —

"That in the opinion of this conference, the legislature of each Australasian colony should pass an act providing for the election of representatives to attend a statutory convention or congress, to consider and adopt a bill to establish a federal constitution for Australia; and upon the adoption of such bill or measure, it be submitted by some process of referendum to the verdict of each colony."<sup>2</sup>

The author of this resolution afterward followed it up with the draft of a proposed bill to

"provide for the representation of Victoria at an Australasian Congress legally created to frame a constitution for the Federation of the Australasian Colonies; and further, to provide for the reference of such constitution, when framed, to the vote of the people."<sup>3</sup>

The distinctive principle of the new movement was that "the people must be directly interested,"<sup>4</sup> and this bill was designed as a model for enabling acts to be passed in all the colonies.

In 1895 a conference of premiers to consider federation was held at Hobart, Tasmania, at which all of the Australasian colonies were represented. Mr. G. H. Reid of New South Wales offered a set of resolutions providing for a popularly chosen convention to frame a constitution which should "be submitted to the electors for acceptance or rejection by a direct vote," and for the submission to each colonial parliament of a bill to carry the plan into effect.<sup>5</sup> A counter attempt was made to revive the Sydney convention scheme of 1891,

<sup>1</sup> Joint author of the work last cited.

<sup>2</sup> Quick and Garran, "Annotated Constitution of the Australian Commonwealth," 153. <sup>3</sup> Id.

<sup>4</sup> Galloway, "Advanced Australia" (London, 1899), 152.

<sup>5</sup> Quick and Garran, "Annotated Constitution of the Australian Commonwealth," 158.



by which the mode of submitting the constitution should be left to each colony; but in the end the Reid resolutions were adopted with but two dissenting votes, and a draft bill prepared in accordance therewith, providing also that the convention therein authorized should take a recess, after framing the constitution, to enable the colonies to consider it and propose amendments.<sup>1</sup> This bill was passed by the parliaments of all save Queensland and New Zealand, and in the colonies which enacted it elections were held and delegates chosen.<sup>2</sup>

The convention met at Adelaide in March, 1897, prepared an instrument which was referred to the colonial parliaments, and adjourned, as required by the enabling acts, to await their suggestions. They offered numerous amendments, which were considered when the convention reassembled at Sydney. Another adjournment was taken, this time to Melbourne, and the convention finally concluded its labors and agreed upon a constitution about one year from the commencement of its sessions.<sup>3</sup>

The submission provided for by the Enabling Acts was now carried out. The acts of Western Australia required that New South Wales must be included in the federation, and submission in the former was deferred until the outcome in the latter colony should be known.<sup>4</sup> In all the other colonies except Queensland and New Zealand, where, as we have seen, the Enabling Act was not adopted, the new constitution went before the people in June, 1898, and out of an aggregate of something more than 220,000 votes, it received a majority of over two-thirds.<sup>5</sup>

The figures disclosed that the Australian electorate was not slow to appreciate its newly acquired privileges. In Victoria and Tasmania the proportion of affirmative to negative votes was nearly five to one; in South Australia more than two to one. In New South Wales alone was the vote at all close, and there the constitution, though having a clear majority of nearly 6000, was declared lost because the Enabling Act required for that colony a vote of 80,000, and those received fell about 8500 short of that number.<sup>6</sup> Early in 1899 another conference of the premiers was held at Melbourne, and

<sup>1</sup> Quick and Garran, "Annotated Constitution of the Australian Commonwealth," 159.

<sup>2</sup> Id. 160 *et seq.*; Galloway, "Advanced Australia," 153, 154.

<sup>3</sup> Quick and Garran, 165 *et seq.*; Galloway, 154, 163.

<sup>4</sup> Id.; Quick and Garran, 213.

<sup>5</sup> Galloway, 165.

<sup>6</sup> Id. 164, 165; Id.

some modifications of the Enabling Act agreed upon, so as to make it more acceptable in New South Wales. The amended act was then passed by the colonial legislatures,<sup>1</sup> and, in June and July, 1899, adopted by a popular vote in all the colonies which had approved the original act, and also at last in New South Wales.<sup>2</sup> In Queensland the amended act was ratified in September of the same year,<sup>3</sup> and was then sent to the British Parliament, where, after some slight alterations, it received the royal sanction July 9, 1900.<sup>4</sup> Later in the same month the Enabling Act, which had now become known as the Commonwealth Bill, was submitted in Western Australia, and adopted by a vote of more than two to one.<sup>5</sup>

As New Zealand was no longer considered a probable member of the new federation, at least at that time, this completed the work of submission, and the commonwealth of Australia entered upon its career, in this respect in advance of the American Federal Union, with a popularly ratified constitution.<sup>6</sup> For the future the practice was insured by requiring all amendments to be submitted to the people of the several states.<sup>7</sup> And not only was the referendum employed in creating, but its use has also been attempted in order to dissolve the Australian commonwealth.<sup>8</sup>

In accounting for the accession of this the most recent community to adopt the policy of popular ratification, we must probably look again to the influence of the United States. In the early constitutional debates and struggles of Australia, her statesmen frequently

<sup>1</sup> Quick and Garran, 221.

<sup>2</sup> Galloway, "Advanced Australia," 167. The majority in New South Wales was nearly 25,000 in a total vote of less than 200,000.

<sup>3</sup> Quick and Garran, 225.

<sup>4</sup> Id. 249.

<sup>5</sup> Id. 250. In round numbers, the vote was 44,000 to 19,000.

<sup>6</sup> In the five colonies which voted the second time prior to the passage of the bill through the imperial parliament, the majority was more than 236,000, in a total vote of less than 520,000. See Quick and Garran, 225.

<sup>7</sup> Chap. VIII, sec. 128, Commonwealth of Australia, Constitution Act, L. R. Stats. (1900), Chap. XII, p. 24 (passed July 9, 1900).

Amendments may be submitted by a majority of both houses of Parliament or (in case a proposal twice passed by one house is rejected by the other) by the governor general. They must be approved by "A majority of the electors voting" and in a majority of the states, and proposals to diminish a state's representation or change its boundaries must also be approved by "a majority of the electors voting" in the state affected.

<sup>8</sup> Witness the bill introduced into the West Australian Assembly for a referendum on the question of secession. See *Political Science Quarterly*, XXI, 744; XXII, 375.

referred to American precedents,<sup>1</sup> and while Swiss models were also before them, it seems likely that when her first generation of native-born voters were casting about for means to promote the cause of Australasian union, they caught from America the suggestion of directly consulting the people. The land that has given us the reformed ballot law, and the simpler system of land transfer, seems to have sought a *quid pro quo* by borrowing the American system of popular ratification.

"Such," says Symonds,<sup>2</sup> "is the Lampadephoria, or torch-race of the nations. . . . The people of the North pass on the flame to America . . . and the Australasian isles."

<sup>1</sup> Rusden, "History of Australia," Vol. III, Chap. XVI, especially pp. 80, 100, 112.

<sup>2</sup> "Renaissance in Italy," II, 546. As this work is passing through the press the information comes that the proposed new South African Constitution is to be submitted to a popular vote in Natal and that an effort to the same end was made in the Transvaal. Thus another stage is reached in the "Lampadephoria" and the "flame" of popular participation in law-making for the first time reaches and illuminates the Dark Continent.

## APPENDIX

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